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ACTION.

See PLEADING.

ACT SOUS SEIGN PRIVÉ.

The decision in *Doubrere* v. *Grillier's Syndic*, 2 Mart. N. S. 171, that an act *sous seign privé* will have effect against third persons from its date, if possession accompanied or followed its execution, was made under the Code of 1808, and is inconsistent with the provisions of art. 2417 of the present Civil Code. *Brassac* v. *Ducros*, 335.

ADMINISTRATOR.

See SUCCESSIONS.

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AGENCY.

1. In an action for the price of certain timber, defendant having alleged that he purchased it from a third person who had it in possession, plaintiff offered the evidence of a witness, taken under a commission, who deposed, that, being entrusted with the timber by plaintiff, he had, without authority, delivered it to the person from whom defendant obtained it. The admission of the evidence was opposed on the ground that the witness, who was the agent of the plaintiff, had a direct interest in the result, as he would be responsible to the latter, in the event of his losing the suit, in consequence of having exceeded his authority. *Held*, that the evidence was admissible.
Marks v. *Landry*, 31.

2. The provision of art. 2976 of the Civil Code that "the attorney is answer-

able for the person substituted by him to manage in his stead, if the procuration do not empower him to substitute," implies that he is not answerable if it did so empower him; and the power is implied whenever the principal knew that the mandatary would be obliged to act by a substitute,

Hum v. *Union Bank of Louisiana*, 109.

3. Bills of exchange and promissory notes are generally placed with a bank for collection, with a notary for protest, and with an attorney to be put in suit. In such cases where the bank, the notary, or the attorney is *omni exceptione major*, an agent who may have received the note for collection, will not be responsible for their neglect or misconduct. *Ib.*

4. A banker who pays a forged check, must support the loss.

Laborde v. *The Consolidated Association of Louisiana*, 190.

5. Notice of protest served on an attorney in fact is sufficient, though the procuration does not confer specially the power to receive such notices, if it gives general powers to transact the bnsiness of the principal, he being abroad. To transmit such notice to the latter at a distant place, might endanger his recourse against previous endorsers, or the maker. *Aliter*, where the power is a limited one, conferring only certain special enumerated powers. In such a case, the procuration cannot be extended beyond what is expressed therein; and the power to receive a notice of protest is not necessarily included in that of endorsing.

De Lizardi v. *Pouverin*, 393.

6. A debtor of plaintiffs, both being non-residents, consigned a lot of cotton to defendants who were commission merchants in New Orleans, for sale. In the bill of lading, which was filled up by one of the latter, it was mentioned, that "the proceeds shall be subject to the order of the plaintiffs." Defendants having sold the cotton, attached the proceeds in their own hands for a debt due to them by the consignor. *Held*, that defendants having received the cotton in virtue of the bill of lading, and sold it, were bound to carry out their agency, and to account to plaintiffs for the proceeds.

Bank of Port Gibson v. *Burke*, 440.

7. Parties interested in a debt or other property, may appoint agents to take care of their interest, and vest them with all necessary powers. C. C. 2951, *et seq.*; and an action may be maintained in the name of the agent, as well as in that of the principal, if power to that effect be given.

Frazier v. *Willcox*, 517.

8. The judges of the inferior courts cannot, of their own accord, appoint receivers for the purpose of collecting or keeping funds, or evidences of debt which may be the subject of litigation before them. Such appointments can be made only with the consent of all the parties interested, and the assent of the judge can add nothing to the powers of the persons so appointed. *Ib.*

AMENDMENT.

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ANSWER.

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APPEAL.

I. *Powers of the Supreme Court for enforcing its Appellate Jurisdiction.*
II. *From what Judgments an Appeal will lie.*
III. *Period within which an Appeal will lie.*
IV. *Citation of Appeal.*
V. *Statement of Facts and Record of Appeal.*

I. *Powers of the Supreme Court for enforcing its Appellate Jurisdiction.*

1. The power to issue writs of prohibition was conferred on the Supreme Court merely as a means of enabling it to exercise its appellate jurisdiction. Like the writ of mandamus, a prohibition may be issued even where a party has other means of redress, if the slowness of ordinary legal proceedings be likely to produce such immediate injury as ought to be prevented.
State v. *The Judges of the Commercial Court of New Orleans*, 48.
2. The writ of mandamus is given to enable the Supreme Court to command inferior courts to act where delay would cause damage and injustice; and the writ of prohibition to restrain them, where their acting without authority would produce similar results. *Ib.*
3. The writ of prohibition is an extraordinary one, and should be issued only in cases of great necessity, clearly shown, and where the party has applied, in vain, to the inferior tribunals for relief. *Ib.*

II. *From what Judgments an Appeal will lie.*

4. Appeal by intervenors, on whose claims no judgment had been pronounced, from a judgment overruling an exception to answering taken by defendant on the ground of the want of proper parties, and ordering a judgment by default to be entered against him. *Held*, that the intervention not having been acted upon, and no final judgment, having been rendered against the defendant, the appeal must be dismissed. *Whittemore* v. *Watts*, 47.
5. By article 567 of the Code of Practice, a party against whom a judgment has been rendered cannot appeal, if he have acquiesced therein, by voluntarily executing it, [*Landry* v. *Connely*, 127;] and the same rule will be extended to one, who, having obtained a judgment, has carried it into execution. *State* v. *Judge of the Parish Court of New Orleans*, 85.
6. A rule on the mortgagee, taken, after an order of seizure and sale had been executed, by one who had been appointed curator *ad hoc* to represent the third possessor of the mortgaged property, to show cause why a certain sum, under the jurisdiction of the Supreme Court, should not be allowed as

a fee for his services, is not such an incident to the principal action, as to make the latter the basis of an appeal, to be used only for the correction of errors committed in the adjustment of such incidental matters. Though arising out of the original action, the demand in the rule is entirely distinct from it, and, being under three hundred dollars, is not appealable. *Ib.*

7. No appeal will lie from an action instituted against several defendants on an instrument by which they are bound severally, as sureties, for a fixed sum, where the amount claimed from each is under three hundred dollars, though the whole claim exceed that sum. The defendants cannot give jurisdiction by joining in one appeal, where they would have no right to be heard separately. *Merritt* v. *Hozey*, 319.

8. No appeal will lie to the Supreme Court from any decision of the Presiding Judge of the City Court of New Orleans, in a case originally instituted before an Associate Judge of that court. *Barthe* v. *Bernard*, 377.

9. No appeal will lie, under ordinary circumstances, in favor of the syndic of the creditors of an insolvent, from an order to produce his bank book. *Perrault* v. *His Creditors*, 396.

III. *Period within which an appeal will lie.*

10. After a suspensive appeal, and execution issued on account of the insufficiency of the security, a devolutive appeal may be obtained, after the ten days have elapsed, without any order formally setting aside the former, which becomes inoperative by the mere failure of the party to comply with the terms on which it was granted. *Meeker* v. *Galpin*, 259.

IV. *Citation of Appeal.*

11. Where by the consent of counsel, an order has been entered, remanding the record for the purpose of being perfected, coupled with an agreement that the whole case shall be submitted on written arguments, within a certain time, the appellee will be considered as having renounced any right to move for a dismissal of the appeal on the ground of want of citation. *Escurieux* v. *Chapduc—Application for a Re-hearing*, 326.

12. Appeal dismissed, for want of proof of service of citation of appeal. *Dolliole* v. *Azéma*, 424.

V. *Statement of Facts and Record of Appeal.*

13. One who excepts to the opinion of an inferior court, must place on the record whatever may be necessary to enable the Supreme Court to come to a decision. *Kees* v. *Lefebvre*, 15.

14. Since the act of 20th March, 1839, (sect. 19,) amending the Code of Practice, no appeal will be dismissed on the ground that the transcript was not filed on the return day, where such transcript was filed before the motion to dismiss. *Duperron* v. *Van Wickle*, 39.

15. Where the record from its incompleteness, will not enable the appellate court to examine the case on its merits, and no assignment of errors has

been filed within ten days after bringing up the record, as required by art 897 of the Code of Practice, the appeal must be dismissed.

Segur v. *Hill*, 147.

16. Evidence not produced on the trial below, cannot be brought before the Supreme Court on appeal. *Smelser* v. *Williams*, 152.

17. Suspensive appeal, but no statement of facts, though the evidence was no reduced to writing, and appeal dismissed for insufficiency of the security. A devolutive appeal having been taken after the lapse of the time for a suspensive appeal, a statement of facts was made out by the court according to law. On a motion to dismiss, on the ground that the statement was made too late: *Held*, that the statement was made in time, and that such statement may be made at any time after judgment signed, provided it be before the appeal, (C. P. 602,) which might have been taken at any time within a year, from the date of the judgment. *Meeker* v. *Galpin*, 259.

18. In the absence of proof to the contrary, it will be presumed that the judgment of an inferior court was rendered on the necessary evidence; but where the record itself shows that a judgment by default could not have been rendered on such evidence as the law requires to make it final, the case will be remanded. *Escurieux* v. *Chapduc*, 323.

19. Where on an appeal from a judgment by default confirmed below, the clerk certifies the record as containing a true copy of *all the documents on file* and proceedings had, but does not show that any other document, which may have been produced, was not filed, and it appears from the transcript that without producing another document, the judgment could not have been legally confirmed, the judgment must be set aside. *Per Curiam.* If no other document was produced, the evidence was insufficient; if produced, it was the plaintiff's duty to have placed it on file. C. P. 585. *Ib.*

20. Where the record contains no statement of facts, bill of exceptions, or assignment of errors, and it appears from a certificate of the clerk on the return of a *certiorari*, that the evidence of a witness examined below, not taken down in writing, cannot be included in the record, the appeal must be dismissed. *Clark* v. *Laidlaw*, 380.

21. A certificate from the Judge of an inferior court, from which an appeal has been taken, will be received at any time to show error in the original certificate appended by him to the transcript of the record; and, on a proper showing, the clerk of the lower court may also be allowed to amend his certificate. *Lafonta* v. *McAllister*, 390.

22. Where the record is not certified as containing all the evidence introduced on the trial, and there is no statement of facts, bill of exceptions, or assignment of error, apparent on the record, the appeal must be dismissed.

Corlis v. *Tyler*, 443.

ASSIGNEE.

See BANKRUPTCY, 4.

ATTACHMENT.

1. In a question as to the sufficiency of the surety on an attachment bond, his actual means, and not the amount for which, from the nature of the case, he may be ultimately liable, must be looked to. C. C. 3011, 3012, 3033.

Lard v. *Strother*, 95.

2. Where an attachment has been set aside on account of the insufficiency of the bond, the plaintiff may take out another attachment without filing a new petition, or having paid the costs of the first. Art. 492 of the Code of Practice does not apply to such a case. *Harrison* v. *Poole*, 193.

3. Action on a draft in favor of plaintiff, drawn by defendant on a person with whom he was connected as a partner in planting. This partner being much in debt, had conveyed to the intervenor, by a deed of trust, executed in another State, his entire interest in the plantation and slaves, for the purpose of applying the crops to the payment of his debts. The intervenor was in possession under the deed, with the knowledge of defendant, though the latter was not a party to the instrument. Plaintiff having attached a part of the crop made by the intervenor on the plantation: *Held*, that the latter cannot be deprived by the creditors of either partner, of any part of the crop, until all the expenses of his management of the plantation have been reimbursed, and that the plaintiff could attach in the hands of the intervenor, only the balance due to defendant on a settlement of accounts.

Endicott v. *Scott*, 265.

4. The property of the principal cannot be seized under execution by a creditor, even to the extent of the consignee's privilege; the creditor of the consignée in such a case, must attach or seize the claim of his debtor in the hands of the consignor. *Montgomery* v. *Brander*, 400.

5. A debtor of plaintiffs, both being non-residents, consigned a lot of cotton to defendants who were commission merchants in New Orleans, for sale. In the bill of lading, which was filled up by one of the latter, it was mentioned, that "the proceeds shall be subject to the order of the plaintiffs." Defendants having sold the cotton, attached the proceeds in their own hands for a debt due to them by the consignor. *Held*, that defendants having received the cotton in virtue of the bill of lading, and sold it, were bound to carry out their agency, and to account to plaintiffs for the proceeds.

Bank of Port Gibson v. *Burke*, 440.

6. An attaching creditor can have no higher or better right to the property attached than his debtor, unless he can show some fraud or collusion by which his rights have been impaired. Liens or privileges existing on the property must be respected. *Frazier* v. *Willcox*, 517.

7. A garnishee has no right to interfere in the merits of the case as between the plaintiff and defendant. He is to be viewed as a stakeholder, bound to disclose the truth. If his declarations be controverted, he may support them, and may oppose any decision that will operate to his prejudice. As to him, the questions are, is he indebted, and whether he can safely pay to the plaintiff. Where there is any doubt as to the validity of the payment,

a stay of proceedings will be ordered, or security to indemnify the garnishee will be required. *Ib.*

ATTORNEY AT LAW.

It will not be presumed that a member of the bar would commence any suit without authority; nor will the production of his powers be required unless on a suggestion supported by affidavit, that he acted without authority. The affidavit should state facts or circumstances rendering it probable that the action was unauthorized. It will not be enough to swear to a mere impression or belief. *Bonnefoy* v. *Landry*, 23.

ATTORNEY IN FACT.

See AGENCY.

BAIL.

On a rule against the sureties on a bail bond, (taken under the act of 28 March, 1840, supplementary to another act approved on the same day,) conditioned that the principal shall not depart from the state for the term of three months without leave of court, or, in case of such departure without leave, that the sureties shall pay the amount for which definitive judgment may be rendered, the plaintiff must show that the principal has left the state within the three months in violation of the bond, or he cannot recover.

Phillips v. *Hawkins*, 218.

BANKS.

1. A banker who pays a forged check, must support the loss.

Laborde v. *The Consolidated Association of Louisiana*, 190.

2. The Merchants Bank of New Orleans, having surrendered its charter, under the act of 14th March, 1842, ch. 98, providing for the liquidation of banks, a judgment dissolving the corporation was rendered, commissioners appointed to close its affairs, and all judicial proceedings against it stayed. Plaintiffs having obtained a rule on defendants, to show cause why certain checks drawn by, or on the bank, should not be received by the commissioners in compensation of a debt of plaintiffs to the bank, and the evidence of such debt given up: *Held*, that the act having declared that, in all matters not otherwise provided for, the proceedings for the liquidation of the banks shall be the same as those prescribed in the acts relative to the voluntary surrender of property, and no especial provision having been made, the rule must be discharged.

White v. *Commissioners of the Merchants Bank of New Orleans*, 363.

3. Under the second section of the act of 5th of February, 1842, ch. 22, reviving the charters of the Banks in the city of New Orleans, the Board of Cur-

rency are entitled to free access to the vaults and books of the Banks; may call upon their officers at any time; may take such memoranda and lists as they think proper and necessary; and may require any officer of such Banks to submit their books and papers to their inspection and examination. But they have no right to call upon those institutions, to make out, at their own expense, statements not expressly required of them by law, though demanded by the Board for the purpose of obtaining information, which it is required by law to lay before the Legislature. The law only exacts that the members of the Board shall be allowed to examine, for themselves, the books and papers of the Banks. *State* v. *Union Bank of Louisiana*, 499.

4. The second section of the act of 24th of February, 1842, ch. 59, supplementary to the act for preventing the further violation of law by the Banks, which imposes a penalty on any president, officer, agent, or clerk of any Bank who shall fail to give a full and complete statement relative to its affairs when required by competent authority, was passed with reference to former laws, and only points out the punishment to be inflicted on those violating their provisions. *Ib.*

See AGENCY, 3. DOMICIL.

BANK OF THE UNITED STATES OF PENNSYLVANIA.

1. A contract make in this State, by the Bank of the United States, created by the State of Pennsylvania, to secure the re-payment of money loaned here, is valid. *Frazier* v. *Willcox*, 517.
2. Nothing in the charter of the Bank of the United States created by the State of Pennsylvania, prohibited it from making loans in Louisiana, at the highest rate of interest allowed by the laws of the latter State; and such loans are not usurious. *Ib.*

BANKRUPTCY.

1. Decision in the case of *Fisher and another* v. *Vose*, 3 Robinson, 457, affirmed. *West* v. *His Creditors*, 88.
2. An application, under the act of Congress of 19th August, 1841, to be declared a bankrupt, made by the insolvent, will have the effect of arresting all proceedings against him, until a decree is rendered by the court sitting in bankruptcy. *Ib.*
3. One who has applied to be declared a bankrupt, under the act of Congress of 19th of August, 1841, must remain in that situation until he is so declared, or his application is rejected. He has no right to dispose of his property, in any way, while such application is pending. He is bound to preserve it for the common benefit of all his creditors, and may exercise such power over it as may be necessary for that purpose. In a case of involuntary bankruptcy the rule may be different. *Ib.*
4. Plaintiff having made a surrender of his property under the insolvent laws of the State, subsequently applied to the District Court of the United States

to be declared a bankrupt under the act of Congress of 1841. Previous to the latter application, his wife, who had obtained a judgment against him, had levied a *fi. fa.* on a claim belonging to the insolvent, alleged to have formed a part of the property given up to his creditors, at the time of his surrender under the insolvent laws of the State. The syndic appointed under the State laws, having taken a rule upon plaintiff to show cause why he should not deliver to him the certificate of the claim, and neither the assignee under the act of Congress, nor the wife of the insolvent having been made parties: *Held*, that the case must be remanded that the question which of the creditors are entitled to claim, may be decided contradictorily with the assignee, and the wife. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Election of Domicil as to Promissory Notes in favor of Banks, under the act of* 13*th March*, 1818.
II. *Transfer.*
III. *Presentment for Payment and Protest.*
IV. *Evidence in Action on.*
V. *Defence to Action on.*
VI. *Responsibility of Agents employed to collect.*

I. *Election of Domicil as to Promissory Notes in favor of Banks, under the act of* 13*th March*, 1818.

1. The act of 13th March, 1818, relative to the election of domicil, with regard to promissory notes, executed in favor of the banks, is repealed by sect. 25 of the act of 25th March, 1828.

Union Bank of Louisiana v. *Lattimore*, 342.

II. *Transfer.*

2. By endorsing a note, joint in their favor, the payees, each of whom can claim only a portion of its amount equal to that of the others, transfer only their respective interests in it; and, on the failure of the maker to pay, each will be liable to the holder to the extent of such interest only. C. C. 2979.

Baggett v. *Rightor*, 18.

3. The endorsee of a promissory note, transferred before maturity, will not be affected by any want of consideration between the maker and the payee, of which he was not aware at the time of the transfer.

Melançon v. *Melançon*, 33.

III. *Presentment for Payment and Protest.*

4. Diligent inquiry for the maker of a note and for his domicil, without effect, will excuse the want of a formal demand of payment.

Baggett v. *Rightor*, 18.

5. Where the endorser of a note has died, notice of protest must be sent to his legal representatives. A notice addressed to the deceased by name, will be bad. And plaintiffs must show that a certain degree of diligence was used to ascertain the executor, administrator, or heirs and representatives of the deceased. *Bank of Louisiana* v. *Smith*, 276.

6. Notice of protest served on an attorney in fact, is sufficient, though the procuration does not confer specially the power to receive such notices, if it gives general powers to transact the business of the principal, he being abroad. To transmit such notice to the latter at a distant place, might endanger his recourse against previous endorsers, or the maker. *Aliter*, where the power is a limited one, conferring only certain special enumerated powers. In such a case, the procuration cannot be extended beyond what is expressed therein; and the power to receive a notice of protest is not necessarily included in that of endorsing. *De Lizardi* v. *Pouverin*, 393.

IV. *Evidence in Action on.*

7. A statement in the protest of a notary, that a demand of payment had been made of the maker of a note, and payment refused, is sufficient proof of an amicable demand. *Flower* v. *Dubois*, 78.

8. Where the protest and certificate of notice have been made in the manner required by the act of 13 March, 1827, copies thereof, certified by the notary to be true copies from the originals in his office, will be evidence of all the matters therein contained. It is not necessary that the certificate should state that such copies were made from a record made in the presence of two witnesses. *Johnson* v. *Marshall*, 157.

9. The certificate of notice of the protest of a bill or note, signed by the notary alone, without the attestation of two witnesses, is insufficient. Such notice must be shown by testimony under oath, or by an official certificate in strict compliance with legal forms. *Ib.*

10. The act of 27 March, 1823, so far as it renders the maker of a note, bill of exchange, or other negotiable paper incompetent, under any circumstances, as a witness in an action against an endorser, was repealed by art. 3521 of the Civil Code. *Ib.*

11. The execution of a note raises a presumption that a just consideration has been given for it; and the maker who pleads error or failure of consideration, must show it: but where one partner is sought to be made liable on a note given by the other, and he alleges fraud and want of consideration, and shows circumstances somewhat suspicious, the burden of proving the consideration will be on the plaintiff. *Harrison* v. *Poole*, 193.

12. A general denial will place the *onus* of proving notice of protest on the plaintiff, who must establish that such notice was sent to the post office, nearest to defendant's residence, whether in the same or another state; and the latter may, under the general issue, show that the office to which it was sent was not the nearest. *Pollard* v. *Cook*, 199.

13. Where the fact of a partnership is clearly shown, and that the bills of exchange sued on were drawn for the purpose of carrying on the business

contemplated by the parties, plaintiffs will not be required to show, that they knew of the existence of the partnership when they took the bills.
Robertson v. *De Lizardi*, 300.

V. *Defence to action on.*

14. Where it was agreed between the payee and maker of a note, that payment should not be exacted in the event of a certain action being decided against the latter, and the maker afterwards, by compromising the suit, renders the fulfilment of the condition impossible, his obligation to pay will become perfect. C. C. 2035. *Rightor* v. *Aleman*, 45.

15. The maker of a note given to the payee for surveys made by the latter at his instance, cannot resist payment on the ground that the amount was out of proportion to the value of the services rendered. Such a case is not one in which relief can be had on the ground of lesion. C. C. 1854, 1855, 1856, 1857. *Ib.*

16. In an action by the payee, against the endorsers of a note who put their names on it merely to secure its payment, the latter must be viewed as sureties, and as such will be entitled to avail themselves of all the pleas, not personal to the principal, of which he could take advantage: C. C. 2208.
Johnson v. *Marshall*, 157.

17. Where one, not a party to a bill or note, puts his name upon it, he will be presumed to have done so as surety. *Gilbert* v. *Cooper*, 161.

18. Where a receipt signed on the execution of a note, recites that it is made in renewal of another in the possession of the payees, which is to be returned by them, or, in default thereof, that the note last executed is to be null, payment of the latter cannot be required until the obligors are put in possession of the first note. It is a condition precedent, upon which the right of recovery depends. *Ib.*

19. Where, in an action against the drawer and endorsers of a promissory note, plaintiffs, after obtaining judgment and execution against the former, order a stay of execution without the assent of the endorsers, the latter will be discharged. *Bank of Louisiana* v. *Smith*, 276.

20. Where notes secured by mortgage, delivered by the maker, have come again into his hands before maturity, the debt evidenced by them is extinguished by confusion. C. C. 2214. By re-issuing such notes, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage securing them, which being only an accessary to the debt between the maker and the payee, was extinguished with it. C. C. 3252, 3374.
Hill v. *Hall*, 416.

21. Where the holders of a note, the payment of which the makers guarantied by the pledge of another note secured by mortgage, do any act by which the mortgage is destroyed, the endorsers of the first note will be released, they having a right to be subrogated to the mortgage. C. C. 3030.
Commissioners of the Merchants Bank v. *Cordeviolle*, 506.

VI. *Responsibility of Agents employed to collect.*

22. Bills of exchange and promissory notes are generally placed with a bank

for collection, with a notary for protest, and with an attorney to be put in suit. In such cases where the bank, the notary, or the attorney is *omni exceptione major*, an agent who may have received the note for collection, will not be responsible for their neglect or misconduct.

Hum v. *Union Bank of Louisiana*, 109.

CATHOLIC CHURCH.

Neither the pope, nor any bishop of the Roman Catholic Church has any authority but a spiritual one, within this State.

Church of St. Francis of Pointe Coupée v. *Martin*, 62.

See CHURCH OF ST. FRANCIS OF POINTE COUPÉE, 2.

CHURCH OF ST. FRANCIS OF POINTE COUPÉE.

1. The church wardens appointed under the act of 14th March, 1814, incorporating the congregation of the Roman Catholic Church of St. Francis of Pointe Coupée, are in their corporate character, the legal owners of the property which that act authorizes them to hold for the purposes therein specified. They are its sole temporal administrators, and cannot be controlled in its administration by the clergy. They are responsible to the congregation alone, who may elect others in their place, in case of misuse or abuse of the powers conferred on them by law.

Church of St. Francis of Pointe Coupée v. *Martin*, 62.

2. The church wardens of the church of St. Francis of Pointe Coupée have the exclusive power of fixing the salary of the parish priest, or the tariff of fees to be paid by the parishioners for marriages, burials, funeral services, &c. No such power can be exercised by the pope or any bishop. *Ib.*

CITATION.

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I. *Civil Code of* 1808.

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COMPENSATION.

1. Article 1265 of the Civil Code, which provides that "any co-heir of age, at the sale of the hereditary effects, can become a purchaser to the amount of the portion owing to him from the succession, and is not obliged to pay the surplus of the purchase money over the portion coming to him, until this portion has been definitively fixed by a partition," does not apply to the case of a husband who resists the payment of a note executed by him, in the hands of the administrator of the succession of the payee, on the ground that his wife is an heir of the deceased. *Landry* v. *LeBlanc*, 37.
2. Compensation takes place by the mere operation of law, the two debts being extinguished as soon as they exist simultaneously. C. C. 2204. *Low* v. *Thomas*, 183.
3. A claim is sufficiently liquidated to be susceptible of compensation, when its correctness is admitted by the debtor. *Reynaud* v. *His Creditors*, 514.

CONFUSION.

Where notes secured by mortgage, delivered by the maker, have come again into his hands before maturity, the debt evidenced by them is extinguished by confusion. C. C. 2214. By re-issuing such notes, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage

securing them, which being only an accessary to the debt between the maker and the payee, was extinguished with it. C. C. 3252, 3374.
Hill v. *Hall*, 416.

CONTRACTS.

I. *Parties, and consent necessary to form.*
II. *Conditional Contracts.*
III. *Alternative Contracts.*
IV. *Illegal Contracts.*
V. *Confirmation.*
VI. *Avoidance.*
VII. *Proof.*

I. *Parties, and consent necessary to form.*

1. One who has undertaken to build a house by the job, according to a plan agreed on, cannot claim an increase of pay for extra work, unless he proves that it was done at the request of the other party. C. C. 2734.
Alston v. *Ross*, 399.

2. It appeared from a copy of a lease offered in evidence, that changes had been made in the original instrument, which were indicated in the margin, but not signed by the parties. *Held*, that until all parties had approved of the proposed changes, the contract was not valid, and consequently inadmissible. *Macarty* v. *Lepaullard*, 425.

3. Under no circumstances can a wife become surety for her husband. The form of the contract will be disregarded. Those who treat with married women, must see that the obligations they contract turn to their advantage.
Firemen's Insurance Company of New Orleans v. *Cross*, 408.

4. The Legislature has power to prohibit foreign corporations from contracting in this State; but until it does so, contracts so made will be enforced.
Frazier v. *Willcox*, 517.

5. A contract made in this State, by the Bank of the United States, created by the State of Pennsylvania, to secure the repayment of money loaned here, is valid. *Ib.*

6. Arts. 423 and 437 of the Civil Code, cannot be construed to forbid corporations created by other States, from contracting in this. Art. 423, is directory only, and declares that corporations, meaning those in the State, must be created by the Legislature. The alternative expression, "*unauthorized by law, or by an act of the Legislature*," in art. 437, shows that it alludes to other corporations than those created by the Legislature of this State, and intended to acknowledge the public character of corporations authorized by the laws of foreign States. *Ib.*

II. *Conditional Contracts.*

7. Where it was agreed between the payee and maker of a note, that pay-

ment should not be exacted in the event of a certain action being decided against the latter, and the maker afterwards, by compromising the suit, renders the fulfilment of the condition impossible, his obligation to pay will become perfect. C. C. 2035. *Rightor* v. *Aleman*, 45.

8. Where a receipt signed on the execution of a note, recites that it is made in renewal of another in the possession of the payees, which is to be returned by them, or, in default thereof, that the note last executed is to be null, payment of the latter cannot be required until the obligors are put in possession of the first note. It is a condition precedent, upon which the right of recovery depends. *Gilbert* v. *Cooper*, 161.

9. Where a party's right to recover depends on an act to be done by him, he must show an actual tender and refusal, or that every thing has been done by him, which could be done, to give effect to the contract. *Ib.*

10. Action on certain bills protested for non-payment. Defence that plaintiff had agreed to renew the bills for three months from maturity, and proof of that fact and of tender by defendants of notes for the renewal. Held, that the obligation under the original bills was extinguished by novation, and that plaintiff could not recover, even with a stay of execution, till the expiration of the three months. *Benedict* v. *Stow*, 390.

III. *Alternative Contracts.*

11. An obligation to pay a certain sum on a particular day, to be discharged by the delivery of a slave of a certain value, is an alternative obligation, from which the debtor may exonerate himself by delivering either of the two things; but he cannot force the creditor to receive a part of one, and a part of the other. So where the creditor has the election, he cannot take a part of the things to be paid or delivered. *Grayson* v. *Houston*, 54.

IV. *Illegal Contracts.*

12. No action can be maintained on an agreement entered into with a view to contravene the general policy of the law. The illegality of a contract, arising from transactions in *fraudem legis*, may be always opposed by the party who wishes to recede from it.

First Congregational Church of New Orleans v. *Henderson*, 209.

13. A promise to pay usurious interest is not such a natural obligation as will form a good consideration for a legal contract. A natural obligation is one which cannot be enforced by action, but which is binding in conscience and according to natural justice. C. C. 1750, § 2. To perform a promise is a matter of conscience; and if a contract, not illicit or immoral, but to enforce which the law gives no remedy is actually performed, as where usurious interest has been paid, the money cannot be recovered. But the continuance of a promise, contrary in itself to law, cannot be enforced, however often the parties may change the evidence of it.

Rosenda v. *Zabriskie*, 493.

14. Where a contract stipulates for usurious interest, the creditor can only recover the principal debt. *Ib.*

15. Art. 2256 of the Civil Code, which forbids the introduction of evidence against, or beyond what is contained in public acts, does not apply to contracts made *in fraudem legis*. A party may show by parol the real nature of such contracts.

Firemen's Insurance Company of New Orleans v. *Cross*, 508.

V. *Confirmation.*

16. An obligation, though null and void *ab initio*, may be ratified or confirmed expressly or tacitly, verbally, in writing, or by acts manifesting clearly such an intention, or even, in some cases, by silence. C. C. 2252.

Landry v. *Connely*, 127.

VI. *Avoidance.*

17. The maker of a note given to the payee for surveys made by the latter at his instance, cannot resist payment on the ground that the amount was out of proportion to the value of the services rendered. Such a case is not one in which relief can be had on the ground of lesion. C. C. 1854, 1855, 1856, 1857. *Rightor* v. *Aleman*, 45.

18. A restriction on the power of a partner to use the name of the firm in the usual course of trade, will be without effect, as to third persons without notice. Not even fraud on the part of one partner will be any defence for his co-partners, where the obligation was contracted in the usual course of their trade, and the fraud was not participated in by the creditor.

Harrison v. *Poole*, 193.

19. A contract or payment made for the purpose of avoiding litigation, cannot be rescinded for error of law. C. C. 1840. *Urquhart* v. *Gove*, 207.

VII. *Proof.*

20. The general rules of evidence established by the Civil Code, book III., tit. IV., ch. 6, arts. 2229 to 2270, are applicable to all contracts whatever.

Johnson v. *Marshall*, 157.

21. The exceptions made by arts. 244, 245, and 246 of the third title of the third book of the Code of 1808, to the rule laid down in art. 243 of the same title and book, as to the proof of contracts which may be appraised in money, exceeding five hundred dollars in value, are virtually repealed by the Civil Code of 1825. C. C. 2257. *Rost* v. *Henderson*, 468.

CORPORATIONS.

1. The Legislature has power to prohibit foreign corporations from contracting in this State ; but until it does so, contracts so made will be enforced.

Frazier v. *Willcox*, 517.

2. The capacity of a foreign corporation to sue, is well established. *Ib.*

3. Art. 423 and 437 of the Civil Code, cannot be construed to forbid corporations created by other States, from contracting in this. Art. 423 is directory only, and declares that corporations, meaning those in the

State, must be created by the Legislature. The alternative expression, "*unauthorized by law or by an act of the Legislature*," in art. 437, shows that it alludes to other corporations than those created by the Legislature of this State, and intended to acknowledge the public character of corporations authorized by the laws of foreign States. *Ib.*

4. The act of 13th March, 1837, ch. 66, relative to limited or anonymous partnerships, does not apply to corporations, but to private associations of individuals. *Ib.*

5. A foreign corporation authorized to contract in this State, may contract according to its laws, where the charter contains no prohibition. *Ib.*

See EVIDENCE, 52.

COSTS.

Defendants admitting a part of the debt sued for to be due, pleaded a tender; and plaintiff having moved for a judgment for the amount so admitted, it was rendered without a trial, for that sum, with costs, leaving the case open as to the balance of the claim: On appeal, *held*, that as to the costs, the judgment was premature; that being thrown by the law on the party cast, they should not be taxed before the final determination of the suit; and that, should defendants prove the tender, and establish the other part of their defence, the costs must fall upon the plaintiff. *Small* v. *Zacharie*, 144.

COURTS.

1. The ordinary tribunals have jurisdiction of suits against heirs, whether minors or of age, in all cases where an estate, after having been administered by a curator, testamentary executor, or tutor of a beneficiary heir, has come into their possession, or has been absolutely accepted; while the courts of probate have exclusive cognizance of all claims for money against successions under the management of curators, testamentary executors, or administrators. C. P. 924, 995, 996. *Babin* v. *Dodd*, 20.

2. Claims against minors, interdicted or absent persons, whose estates are administered by curators, may be recovered before the ordinary tribunals. It is no objection to the exercise of such jurisdiction, that courts of probate have alone the means and right of fixing the amount which a tutor may allow for the expenditures of his ward. Proof of the means and revenue of the latter may be adduced before either tribunal; nor would any judgment of an ordinary court, allowing the claim, interfere with the powers of the court of probate, when auditing the tutor's accounts, to reject such portion of the sum paid under the judgment as might be found to exceed the revenue of the ward; as the tutor would be liable for any illegal acts or contracts made by him, on which such judgment was rendered. *Ib.*

3. A District Court cannot arrest, by injunction, process issued from a Parish Court. *Borne* v. *Porter*, 57.

4. Courts of justice sit to enforce civil obligations only, and will not attempt to enforce those of a spiritual character.

Church of St Francis of Pointe Coupée v. *Martin*, 62.

5. Where the purchaser of property of a succession, sold by order of a Court of Probates, fails to comply with the terms of the sale, that court has authority to compel a compliance, or to order the property to be sold anew, *à la folle enchère*. *Landry* v. *Connely*, 127.

6. The Court of Probates having jurisdiction of actions for the partition of successions, must necessarily inquire what property composes the estate to be partitioned, and have power to decide upon questions of title incidental to the main question of partition, though without jurisdiction, under other circumstances, to decide such a question. *Penny* v. *Weston*, 165.

7. Cases in which the judge has recused himself, transferred in pursuance of the act of 27th February, 1841, ch. 32, from the Court of Probates, to be tried before the special Judge provided by that act, sitting in the District Court, are to be tried in the same manner as if they had not been removed. The law, having made no provision for a trial by jury in the Court of Probates, none can be allowed in any such case by the special judge. *Ib.*

8. Courts of ordinary jurisdiction have exclusive cognizance of actions to annul a partition of slaves, made among the heirs of a succession.

Clark v. *Christine*, 196.

9. Courts of Probate have concurrent jurisdiction, with the District Courts, of an action by the heir for the settlement and partition of the community which existed between a husband and wife, after its dissolution by the death of the latter; and the circumstance of the defendant's denying the heirship of the plaintiff, and alleging himself to be the heir, can in no manner change the nature or object of the action, so as to deprive the Court of Probates of its jurisdiction. Nor can its jurisdiction be affected by the fact that the plaintiff's right to inherit must be determined, before proceeding to examine the issues relative to the settlement and liquidation of the community; the competency of the court being determined by the nature of the legal rights which the plaintiff seeks to enforce, and not by the question of his right to recover. *Babin* v. *Nolan*, 278.

10. Under art. 1037 of the Code of Practice, Courts of Probate are possessed of all the powers necessary to the exercise of their jurisdiction; and they may consequently take cognizance of questions of title arising collaterally, the examination of which is necessary to the decision of the issue joined. *Ib.*

11. Where the tutor of a minor, also the tutor of the minor heirs of a former tutor of the same minor, tenders in the Court of Probates, in his double capacity, his account to his late ward after his majority, it will be no objection, on an opposition by the latter, claiming a tract of land, or its proceeds omitted in the account, and alleged by the tutor to belong to the community which existed between the former tutor and the mother of the other minors, that the judgment, if in favor of the opponent, would be in substance against the heirs of such former tutor, who are not parties to the proceedings, and that the question is one of title, not within the jurisdiction of the Probate

Court. The minor heirs of the first tutor are represented by their tutor, the only person authorized by law to represent them; and the Court of Probates is empowered to determine questions of title, arising collaterally on the trial of other matters within its jurisdiction. *Tutorship of Hacket*, 290.

12. Art. 996 of the Code of Practice, which provides, that when an estate "is in the possession of heirs, either present, or represented in the State, though all or some of them be minors, actions for debts due from such successions shall be brought before the ordinary tribunals, either against the heirs themselves, if they be of age, or against their curators, if they be under age or interdicted," applies to estates accepted absolutely, or to those which, after having been administered by a curator, testamentary executor, &c., have come into the possession of the heirs. If the heirs be all of age, and accept unconditionally, they are immediately put in possession of all the property, and are suable before the ordinary tribunals for their virile portion of the debts, as if contracted by themselves. If some are minors, the succession cannot be accepted by, nor for them, but with the benefit of inventory. When thus accepted, it cannot be administered partially, but the whole estate must be placed under the management of an administrator, and no part comes legally into the possession of the heirs as such, until the administration is terminated, or a partition is legally made among the heirs. Until such administration or partition, the estate must be administered under the authority of the Court of Probates, in which it was opened, and all claims for money against it must, under arts. 924, § 13, and 983 of the Code of Practice, be presented there for settlement. C. C. 1002, 1040, 1051. C. P. 992. Act 25th March, 1828, ch. 83, § 13. *Picou* v. *Dussuau*, 412.

13. The judges of the inferior courts cannot, of their own accord, appoint receivers for the purpose of collecting or keeping funds, or evidences of debt which may be the subject of litigation before them. Such appointments can be made only with the consent of all the parties interested, and the assent of the judge can add nothing to the powers of the persons so appointed. *Frazier* v. *Willcox*, 517.

See APPEAL, 1, 2. NEW ORLEANS, CITY OF, 1.

CURATOR AD HOC.

Defendants having obtained an order of seizure and sale on a judgment rendered in another State, plaintiff became the purchaser of his own property at a twelve months credit, for the price of which he gave a bond in conformity to law. Previous to its becoming due, he obtained an injunction to prevent defendants from issuing any execution on it, and procured the appointment of a curator *ad hoc*, to represent the defendants, who resided in another State. A commission to take testimony having been taken out by plaintiff, he caused the interrogatories to be served on the curator *ad hoc*. On an objection to the admission of the depositions: *Held*, that defendants having an attorney of record in the proceedings to obtain the order of seizure and sale, the case was not one for the appointment of a curator *ad hoc*;

and that the interrogatories, not having been served on the defendants, or their counsel, were inadmissible. *Lard* v. *Strother*, 95.

CUSTOM, COMMERCIAL.

See SALE, 19.

DEFAULT.

See JUDGMENT BY DEFAULT.

DOMICIL.

1. The act of 13th March, 1818, relative to the election of domicil, with regard to promissory notes, executed in favor of the banks, is repealed by sect. 25 of the act of 25th March, 1828.

Union Bank of Louisiana v. *Lattimore*, 342.

2. Where the stockholder of a bank gives a note to the institution, even for the re-payment of a sum he was entitled to borrow, under its charter, the claim of the bank against him, is similar to that against any other borrower; and the obligation of the stockholder, results rather from his note, than from any relations as a partner in the bank. He cannot, consequently, where his domicil is in another parish, be cited before the tribunals of the place where the bank is established, under art. 165, No. 2, of the Code of Practice, relative to suits against partners. *Ib.*

DONATIONS MORTIS CAUSA.

1. The executors appointed by the testator, or, in case of their failure to act, a dative testamentary executor, are the only persons competent to carry the provisions of a will into effect.

State v. *Judge of Probates of New Orleans*, 42.

2. A bequest by testament duly proved and ordered to be executed, is a title translative of property, as much as a donation *inter vivos*. C. C. 3451.

Sides v. *Nettles*, 170.

3. The legatee of a particular object will not be presumed to be cognizant of any defect of title in the testator, but be regarded as a possessor in good faith. *Ib.*

4. A bequest by which the testator directs that certain slaves shall be given to his legatees, to serve them until such slaves attain a certain age, when they are to be emancipated, is not a *fidei-commissum*. The emancipation is a donation to the slaves of their value, to be received at a future and fixed period; and the usufruct, or hire of them in the mean time, is a legacy to those in whose favor it is made. *Nimmo* v. *Bonney*, 176.

5. Where slaves are directed by a testator to be immediately emancipated by his executors, the heirs of the deceased will be entitled to retain them in

their possession, and to enjoy their services, until they can be legally emancipated. *Ib.*

6. The validity of a judgment ordering the execution of a will cannot be inquired into collaterally. *M'Cluskey* v. *Webb*, 201.

7. A bequest of whatever may remain after the payment of debts to a sister of the testator, for the purpose of educating her children, and subsisting her and them, with power to her to make such other disposition of the property to their use and benefit as circumstances may require; and providing that his brother shall participate in such property, to a certain extent, should he consider himself in equal need with his sister's family, is not a substitution or a *fidei-commissum*. *Per Cur.* The testator does not leave the property to his sister to preserve it for, and surrender it at any time to her children. She has the entire control of it, to maintain herself and children, to educate them, and to do whatever she may think their interest requires. She may expend it all for such purposes. *Ib.*

8. A substitution is never presumed. Unless the will cannot be understood otherwise it will be maintained. *Ib.*

9. Defendant's ancestor bequeathed $2000 a year, for five years to plaintiffs, to commence five years after his death. At the time of the bequest and of the testator's death, plaintiffs were prohibited by their charter, from receiving any legacy exceeding $1000; but this restriction was removed by an act of the Legislature before the first annual payment became due. A compromise having been entered into between the heirs and legatees, by which it was stipulated that a certain amount should be paid to plaintiffs by the heirs, in satisfaction of their legacy, this action was commenced to recover the portion due by the defendant. *Held*, that plaintiffs can only take $1000; that the term fixed by the testator for the payment of the legacy, cannot be assimilated to a condition; that in the former case the right is acquired and perfect, the exercise of it being only suspended, while in the latter, it is uncertain whether the legatee will ever be able, in consequence of the condition, to claim the legacy; that in the first case, the right could not be acquired by a person incapable at the testator's death; but that in the second, the capacity is only required to exist at the time of the accomplishment of the condition; (C. C. 1459, 1460, 1691, 1692;) and that the want of capacity at the death of the testator could not be removed by subsequent legislation, which can only be prospective in its operation.
First Congregational Church of New Orleans v. *Henderson*, 209.

10. One who has accepted a remunerative legacy, will be bound by the acceptance. If he considered himself entitled to claim a larger sum for his services, he should have renounced the legacy, and have claimed as a creditor.
Succession of Cucullu, 397.

11. The deceased bequeathed to the mother of his natural children certain lots of ground, "*pour en jouir sa vie durant, reversible après elle à mes enfans naturels alors existans, ou à leurs représentans.*" *Held*, that this was no substitution, but a bequest of the usufruct to the mother, and of the property to the children, allowed by art. 1509 of the Civil

Code; and that the rights of the latter vested at the opening of the succession of the testator, and not at the death of the mother.
Succession of Ducloslange, 409.

12. Unless the will necessarilly presents a substitution, and can be understood in no other manner, the disposition will be sustained. *Ib.*

13. No right of action can accrue from a verbal disposition *mortis-causa*. C. C. 1563, 1569. *Rost* v. *Henderson*, 468.

DOTAL PROPERTY.

See HUSBAND AND WIFE.

EMANCIPATION OF SLAVES.

1. A bequest by which the testator directs that certain slaves shall be given to his legatees, to serve them until such slaves attain a certain age, when they are to be emancipated, is not a *fidei-commissum*. The emancipation is a donation to the slaves of their value, to be received at a future and fixed period; and the usufruct, or hire of them in the meantime, is a legacy to those in whose favor it is made. *Nimmo* v. *Bonney*, 176.

2. Where slaves are directed by a testator to be immediately emancipated by his executors, the heirs of the deceased will be entitled to retain them in their possession, and to enjoy their services, until they can be legally emancipated. *Ib.*

3. Action by the heirs against the executors to recover the possession of certain slaves until they can be legally emancipated, in compliance with the will of the testator and the value of their services from the death of the ancestor: *Held*, that the petitioners having proved their heirship only on the trial of the cause, the executors, who were rightfully in possession of the slaves and bound to keep them, are not accountable for the value of their services. *Ib.*

ERROR.

1. A payment made in error may be recovered back, where such error, though the fault of the plaintiff, has not injured the party to whom the payment was made. *Massias* v. *Gasquet*, 137.

2. A contract or payment made for the purpose of avoiding litigation, cannot be rescinded for error of law. C. C. 1840. *Urquhart* v. *Gove*, 207.

See APPEAL, 21.

EVIDENCE.

I. *General Rules of Evidence established by Chap.* 6, *Title* IV., *Book* III. *of the Civil Code.*

II. *Right of Party to introduce Evidence.*

III. *When Evidence must be introduced.*
IV. *Onus Probandi.*
V. *Presumption.*
VI. *Admissions.*
VII. *Matters Judicially Noticed.*
VIII. *Competency of Witness.*
IX. *Commissions to take Testimony.*
X. *Judicial Records and Proceedings, and Copies thereof.*
XI. *Non-Judicial Records and other Public Instruments, and Copies thereof.*
XII. *Private Writings.*
XIII. *Loss or Destruction of Writings.*
XIV. *Proof of Contracts, not in writing, over five hundred dollars in value.*
XV. *Admissibility of Parol Evidence to prove Fraud or Simulation.*
XVI. *Inadmissibility of Parol Evidence to prove Title to Real Property.*
XVII. *Secondary Evidence.*
XVIII. *Irrelevant Evidence.*
XIX. *Evidence in Particular Actions.*
1. *In Actions of Nullity or Rescission.*
2. ——— *against Partners.*

I. *General Rules of Evidence established by Chap. 6, Tit. IV, Book III. of the Civil Code.*

1. The general rules of evidence established by the Civil Code, book III, tit. IV, ch. 6, arts. 2229 to 2270, are applicable to all contracts whatever.

Johnson v. *Marshall*, 157.

II. *Right of Party to introduce Evidence.*

2. Injunctions, arresting summary proceedings, apparently authorized by the parties, are required by the Code of Practice, (arts. 740, 741, 751, 756,) to be tried summarily; but the parties cannot be deprived of any of the means of procuring evidence, within a reasonable delay. *Slidell* v. *Rightor*, 59.

III. *When Evidence must be introduced.*

3. Evidence not produced on the trial below, cannot be brought before the Supreme Court on appeal. *Smelser* v. *Williams*, 152.

IV. *Onus Probandi.*

4. Where a party's right to recover depends on an act to be done by him, he must show an actual tender and refusal, or that every thing has been done by him, which could be done, to give effect to the contract.

Gilbert v. *Cooper*, 161.

5. The execution of a note raises a presumption that a just consideration has been given for it; and the maker who pleads error or failure of consideration, must show it: but where one partner is sought to be made liable on a note given by the other, and he alleges fraud and want of consideration, and shows circumstances somewhat suspicious, the burden of proving the consideration will be on the plaintiff. *Harrison* v. *Poole*, 193.

6. A general denial will place the *onus* of proving notice of protest on the plaintiff, who must establish that such notice was sent to the post office, nearest to defendant's residence, whether in the same or another state; and the latter may, under the general issue, show that the office to which it was sent was not the nearest. *Pollard* v. *Cook*, 199.

7. As a general rule no one will be presumed to have paid what he was not bound for; and where he reclaims an amount so paid, the burden of proving that he was neither legally nor morally bound therefor, will be on him.

Urquhart v. *Gove*, 207.

8. On a rule against the sureties on a bail bond, (taken under the act of 28 March, 1840, supplementary to another act approved on the same day,) conditioned that the principal shall not depart from the State for the term of three months without leave of court; or, in case of such departure without leave, that the sureties shall pay the amount for which definitive judgment may be rendered, the plaintiff must show that the principal has left the State within the three months in violation of the bond, or he cannot recover.

Phillips v. *Hawkins*, 218.

9. Where the evidence is so contradictory, that the court cannot determine to whom the property in dispute belongs, the plaintiff must be nonsuited.

Turner v. *Lockwood*, 444.

See HUSBAND AND WIFE, 14.

V. *Presumption.*

10. Where a married man removes to this State from one in which the common law, except so far as modified by statute, prevails, by which the personal property of the wife vests in the husband by the marriage, and where slaves are movables by law, any slaves or other personal effects brought by him will be presumed to have belonged to him. It will be for the wife, or third persons, to destroy the presumption, by proof of title in themselves.

Penny v. *Weston*, 165.

11. A substitution is never presumed. Unless the will cannot be understood otherwise it will be maintained. *McCluskey* v. *Webb*, 201.

12. The provision of the tenth section of the act of 28th March, 1840, abolishing imprisonment for debt, that the failure by a debtor "to pay over mo-

ney received, or collected for, or deposited with him for another" shall be held presumptive evidence of fraud, cannot be applied to the case of a partner who has received and refuses to pay over money belonging to the partnership, and who is not liable for any specific sum, but only to account as a managing partner. It applies to those only who, having received money for another, without authority to dispose of it, failed to pay it over to the right owner. *Hanna* v. *Auter*, 221.

13. In the absence of any expression of legislative will, proof of its being the commercial custom of a particular place as to certain articles, to take back the whole lot sold, and to restore the price on the discovery of any portion being defective, would be entitled to some weight, if shown to have existed long enough to have become generally known, and to warrant the presumption that contracts were made in relation to it; but where the law has provided a rule, no customs of any set of men can have a force paramount to the law. *Ledoux* v. *Armor*, 381.

14. Where the purchaser at a Sheriff's sale, shows a judgment, execution, and sale, the presumption *omnia recte acta*, will arise in his favor. It is for the opponent, who seeks to annul the sale, to destroy this presumption, by proof of such irregularities as must vitiate the proceedings.

New Orleans Gas Light and Banking Company v. *Allen*, 387.

VI. *Admissions.*

15. The rule that a party, wishing to avail himself of the admissions of his adversary, cannot divide them, but must take them entire, does not apply to admissions in the pleadings; but only to answers to interrogatories, (C. P. art. 356,) or to judicial confessions made according to art. 2270 of the Civil Code. Thus, where the debt is acknowledged, but a tender of the amount alleged, the plaintiff will be exempted from the necessity of proving his claim; but as a matter of defence, the tender must be established by legal evidence, like any other fact tending to show a discharge from the obligation sued on. *Small* v. *Zacharie*, 144.

16. Plaintiff cannot contradict by parol evidence, an act of mortgage on which he sues, or prove any thing beyond it. *Hill* v. *Hall*, 416.

17. Action for the price of certain articles of furniture, and answer that plaintiff had sold the furniture to a third person, from whom defendant had purchased it. Bills made out in the name of such third person, and receipts for notes given in payment by him as so much cash, were produced by defendant. Plaintiff having offered to introduce witnesses to prove that the sale was made to defendant, the latter objected to the admission of the evidence as contradicting the proof under the plaintiff's own hand; and on the ground, that the petition did not aver that the sale was made for her use. *Held*, that the evidence was inadmissible; and judgment of nonsuit.

Lyons v. *Jackson*, 465.

VII. *Matters Judicially Noticed.*

18. Post offices in the United States are established by law; and no evidence is required of what the law is. *Pollard* v. *Cook*, 199.

VIII. *Competency of Witness.*

19. In an action for the price of certain timber, defendant having alleged that he purchased it from a third person who had it in possession, plaintiff offered the evidence of a witness, taken under a commission, who deposed, that being entrusted with the timber by plaintiff, he had, without authority, delivered it to the person from whom defendant obtained it. The admission of the evidence was opposed on the ground that the witness, who was the agent of the plaintiff, had a direct interest in the result, as he would be responsible to the latter, in the event of his losing the suit, in consequence of having exceeded his authority. *Held*, that the evidence was admissible.

Marks v. *Landry*, 31.

20. The fact of being a creditor of a party to a suit, does not disqualify a witness from testifying on his behalf. *Lard* v. *Strother*, 95.

21. The act of 27th March, 1823, so far as it renders the maker of a note, bill of exchange, or other negotiable paper incompetent, under any circumstances, as a witness in an action against an endorser, was repealed by art. 3521 of the Civil Code. *Johnson* v. *Marshall*, 157.

22. In an action to recover a sum paid out by the bankers of the plaintiff on a check alleged by the latter to have been forged, the testimony of a witness, taken under commission, declaring that he forged the check, will be admissible; the objection resulting from his confession, going to his credit, rather than to his competency. Even a verdict of guilty, not followed by judgment, is not sufficient to establish the infamy of the witness, and render him incompetent. *Laborde* v. *The Consolidated Association of Louisiana*, 190.

IX. *Commissions to take Testimony.*

23. Under the 17th section of the act of 20th March, 1839, commissions to take testimony may be taken out by either party, at any time after service of petition and citation; and it will be no objection to the admissibility of the evidence, that it relates to facts not then at issue, nor alleged in the petition. *Mayo* v. *Savory*, 1.

24. Defendants having obtained an order of seizure and sale on a judgment rendered in another State, plaintiff became the purchaser of his own property at a twelve months credit, for the price of which he gave a bond in conformity to law. Previous to its becoming due, he obtained an injunction to prevent defendants from issuing any execution on it, and procured the appointment of a curator *ad hoc*, to represent the defendants, who resided in another State. A commission to take testimony having been taken out by plaintiff, he caused the interrogatories to be served on the curator *ad hoc*. On an objection to the admission of the depositions: *Held*, that defendants having an attorney of record in the proceedings to obtain the order of seizure and sale, the case was not one for the appointment of a curator *ad hoc*; and that the interrogatories, get having been served on the defendants, or their counsel, were inadmissible. *Lard* v. *Strother*, 95.

25. The interrogatories to be propounded to a witness, under a commission,

were served on defendants' counsel, who declined to add any cross interrogatories, but reserved the right of having legal notice of the time of taking the answers of the witness. Notice was not given to defendants' counsel; but the commissioner certified that he gave *timely notice* to the defendants, without showing how it was given, or upon whom it was served. *Held*, that defendants having an attorney on record, who had reserved the right of notice, such notice should have been given to him, that he might be present at the taking of the testimony, and that the deposition was inadmissible. C. P. 434. *Smelser* v. *Williams*, 152.

X. *Judicial Records and Proceedings, and Copies thereof.*

26. Where one who certifies the transcript of a judgment from another State, styles himself in the body of the certificate, the clerk of the court, and signs it as such, all of which is attested by the seal of the court, and the certificate of the Chief Justice or Presiding Magistrate, no further evidence will be necessary to establish his official capacity. *Van Wyck* v. *Hills*, 140.

27. The principal object of the law requiring a public inventory to be made of all the effects, movable and immovable, of a succession or community, is to establish the existence of all the property, and to show the whole amount, or value thereof. C. C. 1098, 1099, 1100, 1101. Such an inventory is to serve us as the basis of the settlement of the estate, so far as it shows the effects belonging to it, but is not conclusive proof of the real value of the property, nor the exclusive criterion by which those who are interested, are to be charged in the partition and settlement of the estate. Save where the law has declared in positive terms that the property inventoried shall be taken at the estimated value, such estimation is not conclusive.

Babin v. *Nolan*, 278.

28. The statement in the return of a Sheriff on an order of seizure and sale, is *prima facie* evidence of the advertisements and appraisements required by law. *New Orleans Gas Light and Banking Company* v. *Allen*, 387.

XI. *Non-Judicial Records and other Public Instruments, and Copies thereof.*

29. Where the proclamation of the President, offering a portion of the public lands of the United States for sale, is produced together with patents to a purchaser at such sale, the court will not look beyond them to ascertain whether the lands had been regularly surveyed. *Combs* v. *Dodd*, 58.

30. A statement in the protest of a notary, that a demand of payment had been made of the maker of a note, and payment refused, is sufficient proof of an amicable demand. *Flower* v. *Dubois*, 78.

31. Where the laws of another State which should govern the case, are not in evidence, our own must prevail. *Van Wyck* v. *Hills*, 140.

32. Where the protest and certificate of notice have been made in the manner required by the act of 13th March, 1827, copies thereof certified by the notary to be true copies from the originals in his office, will be evidence of all the matters therein contained. It is not necessary that the certificate

should state that such copies were made from a record made in the presence of two witnesses. *Johnson* v. *Marshall*, 157.

33. The certificate of notice of the protest of a bill or note, signed by the notary alone, without the attestation of two witnesses, is insufficient. Such notice must be shown by testimony under oath, or by an official certificate in strict compliance with legal forms. *Ib.*

34. It is no objection to the introduction in evidence of an act of the Legislature of another State, extending the charter of a Bank, for the purpose of proving its existence as a corporation, that the original act of incorporation is not produced. The act offered, certainly proves *rem ipsam*—that the extension of the charter was granted. *Philadelphia Bank* v. *Lambeth*, 463.

35. Acts of the Legislature, or extracts from the executive minutes of another State, attested by the Secretary of State, and accompanied by a certificate from the Governor, under the great seal of the State, declaring that the person who attests them is the Secretary of State, and that his attestation is in due form, are sufficiently proved. *Ib.*

XII. *Private Writings.*

36. Where in an action for the partition of a succession, in which a settlement of all claims among the heirs ought properly to be gone into, an act signed by the tutrix of the minor heirs, waiving her mortgage as tutrix on a tract of land, had been given in evidence, a promissory note executed as evidence of the debt secured by the mortgage, may be received to rebut the presumption of payment resulting from the release of the mortgage. *Penny* v. *Weston*, 165.

37. The master of a vessel cannot hypothecate her for a pre-existing debt, and the necessity for the loan must be shown to have existed at the time it was made. The bond is not evidence of this necessity, nor of the absence of other means of obtaining the money. This must be shown *aliunde*, and otherwise than by the statement of the master, who cannot acquire authority from his own assertions. *Clark* v. *Laidlaw*, 345.

38. The act of 18th March, 1818, creating the offices of Surveyor General and Parish Surveyor, contains nothing indicating an intention to prevent any municipal corporation within a parish, from appointing their own surveyors, or making it the duty of owners of property to employ the surveyors appointed by the State, and no other; and arts. 828, 829 of the Civil Code mainly relate to cases of dispute between adjoining proprietors as to the boundaries between their lands. Although the formalities prescribed by these articles are required to be fulfilled by a sworn officer of the State, for the purpose of fixing permanently the limits of property, it does not follow that a surveyor appointed by a municipal corporation, or any other not commissioned by the State, cannot be employed by a proprietor desirous of having his land surveyed and its limits ascertained; but such survey and fixing of limits, will not have the same binding effect upon his neighbor, as if made by the Parish Surveyor, nor will the *procès verbal* prove itself, or obtain full faith in the courts of this State. *Buisson* v. *Grant*, 360.

39. Action by the executor for the price of one-third of a certain lot purchased by defendant, at the probate sale of the property of the deceased; the petition alleging, that the lot belonged jointly and equally to the deceased, the defendant, and a third person, though the title was in the name of defendant; and, that it was sold at the sale of the succession by consent of all parties. Answer, that though it appeared by a counter-letter, that he, defendant, owned only one-third; that he purchased from the deceased, and was to sell the same, and account to the deceased and the third joint proprietor, each for one-third, yet that a fourth party had been a joint owner with the deceased; that he, defendant, had endorsed notes to enable the deceased to purchase the interest of such fourth party, which he, defendant, had, after renewal, to pay, owing to the insolvency of the deceased; and that the title to the whole lot was made to him by deceased, to secure him against his endorsement, and the counter-letter executed by him, in consequence. Plaintiff having produced, under a rule taken on him, the original notes drawn by the deceased and endorsed by defendant, the books of the deceased, and other memoranda in his possession relative to the sale, a counter-letter between the deceased and the fourth party, showing the interest of the latter, and their accounts with each other; defendant offered them in evidence to sustain the allegations of his answer. Plaintiff objected to their being received, on the ground that the notes were not mentioned in the counter-letter signed by defendant. *Per Curiam:* Though the counter-letter does not speak of the notes, or of the interest of such fourth party, evidence is admissible to prove such interest, when it consists of other written documents in the possession of the deceased. Such documents do not contradict the counter-letter, but show another contract connected with the first, in relation to the same transaction, in which all were partners. Nor can the evidence be excluded on the ground that the defendant, sued as a purchaser at the sale of the succession, cannot plead in compensation, a debt due to him by the deceased. It is clearly not a question of compensation in the ordinary sense of the word. *Blanchard* v. *Lockett*, 370.

40. Receipts signed by a third person in his own name, and not shown to be connected in any way with the defendants, are inadmissible in evidence against them. *Farias* v. *De Lizardi*, 407.

41. It appeared from a copy of a lease offered in evidence, that changes had been made in the original instrument, which were indicated in the margin, but not signed by the parties. *Held*, that until all parties had approved of the proposed changes, the contract was not valid, and consequently inadmissible. *Macarty* v. *Lepaullard*, 425.

XIII. *Loss or Destruction of Writings.*

42. Where the affidavit of the plaintiff of the loss of the instrument sued on, has been read without objection, parol evidence may be admited to prove its contents. *Adams* v. *McCauley*, 184.

XIV. *Proof of Contracts, not in Writing, over five hundred dollars in value.*

43. Where a judgment by default has been obtained on a claim exceeding five hundred dollars, it may be confirmed on the testimony of a single witness, the fact of the debt not being denied being a corroborating circumstance. The possession of the note sued on, may be also viewed as a corroborating circumstance. *Leeds* v. *Debuys*, 257.

44. The exceptions made by arts. 244, 245, and 246 of the third title of the third book of the Code of 1808, to the rule laid down in art. 243 of the same title and book, as to the proof of contracts which may be appraised in money, exceeding five hundred dollars in value, are virtually repealed by the Civil Code of 1825. C. C. 2257. *Rost* v. *Henderson*, 468.

XV. *Admissibility of Parol Evidence to prove Fraud or Simulation.*

45. A. had two children by his wife, who, after his death, married B., by whom she also had children, and B. became the tutor of the children of the first marriage. B. having died, C. was appointed tutor to the issue of both marriages, and after the majority of the children by the first husband, presented his accounts to the Court of Probates, both as their tutor, and as tutor of the minor heirs of their first tutor. On an opposition to the approval of the account made by the heirs of the first marriage, claiming the proceeds of a tract of land, included in an inventory made after the death of the wife, of the community which existed between her and her second husband which had been adjudicated to the latter as property common between him and his children. and which, after his death, was sold as belonging to his succession, it was proved that the land belonged to the father of the opponents before his marriage. The land was claimed by the heirs of B., under an act of sale executed by A. to D., from whom they derived title. D. being sworn as a witness testified, that the land had been conveyed to him by A., but that he had never paid any part of the price, nor taken possession of the land, there being an understanding between A. and himself, that he should reconvey the land when required; that after A.'s death, in consideration of receiving back a note he had given for the price from B., he conveyed the land to B. and his wife, believing that thereby the legal title thereto would be vested in the heirs of A. The tutors excepted to the admissibility of this evidence, on the ground that A. having been a party to the sale to D. the opponents, his heirs, cannot, any more than he could, prove its simulation, without producing a counter-letter. *Per Curiam.* If such a letter had been taken by A., as the evidence renders probable, it must have fallen into the hands of B. their tutor, and the very person who they allege attempted to defraud them. Under such circumstances they should, perhaps, be permitted to prove the simulation by parol.

Tutorship of Hacket, 290.

46. As a general rule, written titles are conclusive between the parties, and

they are estopped from contradicting them; but third persons, not parties to an act, may prove its simulation by parol, or that an act purporting to be a sale, was in truth a *dation en payement* for the benefit of such third persons, and this especially where fraud is alleged. *Ib.*

47. Art. 2256 of the Civil Code, which forbids the introduction of evidence against, or beyond what is contained in public acts, does not apply to contracts made *in fraudem legis*. A party may show by parol the real nature of such contracts.

Firemen's Insurance Company of New Orleans v. *Cross*, 508.

48. A wife, who had mortgaged her paraphernal property to secure the payment of a loan, which was received by her husband, and did not enure to her benefit, though appearing alone in the contract, as having borrowed the amount with the authorization of her husband, may show by parol the real character of the transaction, and exonerate herself. *Ib.*

XVI. *Inadmissibility of Parol Evidence to prove title to Real Property.*

49. Parol evidence is inadmissible to prove a sale of real estate.

Smelser v. *Williams*, 152.

50. On an opposition to an account rendered by a tutor, a witness will be allowed to prove that the tutor told him that he had sold a slave belonging to his ward for a certain sum. *Per Curiam.* The testimony does not go to make out a sale or transfer of a slave, or to affect the title to one, but to establish the receipt of money by the tutor for property disposed of by him for which he must account. *Tutorship of Hacket*, 290.

XVII. *Secondary Evidence.*

51. Secondary evidence will only be admitted, where the absence of better has been sufficiently accounted for. *Lard* v. *Strother*, 95.

52. Where the object is to prove the existence of a corporation in another State, it is no objection to the admissibility of the testimony of a witness offered to prove that he had corresponded with the corporation, that the act of incorporation would be better evidence.

Philadelphia Bank v. *Lambeth*, 463.

XVIII. *Irrelevant Evidence.*

53. On a rule to show cause, why a writ of provisional seizure should not be set aside, evidence will be inadmissible to establish facts, alleged as grounds for the rule, which belong to the merits of the case, or relate to the truth of the affidavit, which no law authorizes the defendants to disprove.

McCarty v. *Lepaullard*, (2d case,) 425.

XIX. *Evidence in particular Actions.*

1. *In Actions of Nullity or Rescission.*

54. To annul a mortgage on the ground that it was executed *in tiempo inhabil*, and intended to secure to the mortgagee an illegal preference over the other

creditors, it is not enough that the fact of insolvency be shown; knowledge of it must be brought home to the mortgagee. C. C. 1973, 1979, 1980. And the action to annul must be brought within one year from the date of the mortgate. Ib. 1982. *Barrett* v. *His Creditors*, 408.

2. *In Actions against Partners.*

55. Where the fact of a partnership is clearly shown, and that the bills of exchange sued on were drawn for the purpose of carrying on the business contemplated by the parties, plaintiffs will not be required to show, that they knew of the existence of the partnership when they took the bills.
Robertson v. *De Lizardi*, 300.

56. The publication in a newspaper by a third person, that he is a member of a commercial partnership, cannot be considered as an act emanating from any of the partners and giving credit to such person, unless knowledge of the publication be brought home to the partner sought to be charged. To render the latter responsible for the acts of such third person, it must be proved that credit was given to the partner, and that he tacitly acquiesced therein. Nor will the payment by the firm of acceptances by such third person made in their name, prove any thing against such partner, where it is shown that he was absent from the place of business of the firm until after its dissolution. *Fearn* v. *Tiernan*, 367.

EXCEPTION.

See PLEADING, 15, 17, 18, 19, 21, 22.

EXCEPTIONS, BILL OF.

One who excepts to the opinion of an inferior court, must place on the record whatever may be necessary to enable the Supreme Court to come to a decision. *Kees* v. *Lefebvre*, 15.

EXECUTOR.

See DONATIONS MORTIS CAUSA, 5. SUCCESSIONS.

EXECUTORY PROCESS.

1. By the common law, where no execution has been taken out on a judgment for a year and a day, the judgment creditor may render his judgment executory, either by a *scire facias*, or an ordinary suit within twenty years. The remedy is cumulative. By the laws of this State where a judgment has the force *rei judicatæ* he may either obtain an order of seizure and sale, or bring an ordinary suit. C. P. 746, 748. *Pillet* v. *Edgar*, 274.

2. No execution can be issued in this State on a judgment rendered in another State which has ceased to be executory there, in consequence of no execu-

tion having been taken out within a year and a day after it was rendered. The courts of this State cannot enforce a judgment, which the court of the State in which it was rendered, cannot execute. *Ib.*

3. The purchasers of property subject to a mortgage with the *pact de non alienando*, are not entitled to notice of an order of seizure and sale. The property is liable to be sold as if still in possession of the original mortgagor. *New Orleans Gas Light and Banking Company* v. *Allen*, 387.

4. The statement in the return of a Sheriff on an order of seizure and sale, is *prima facie* evidence of the advertisements and appraisements required by law. *Ib.*

5. Defendant executed a mortgage on a slave to secure the payment of a note given to plaintiff, the act stipulating that the mortgagor should, on paying a part be entitled to renew the note for the balance, for a limited time, but there was no provision extending the mortgage to the new note. There was a part payment, and renewal for the balance; plaintiff giving up to defendant the original note. Plaintiff afterwards presented the second note to the notary, and obtained from him a certificate that the original note had been presented to him, that plaintiff had declared that he had received the part payment and taken the second note in renewal, and that he, the notary, had *paraphed* it for the purpose of identifying it with the transaction. This certificate was not recorded at the Mortgage Office. Defendant sold the slave, under a certificate from the Recorder of Mortgages, that a mortgage existed on the slave to secure the payment of the first note. On an opposition by the purchaser to an order of seizure and sale taken out by plaintiff: *Held*, that the mortgage did not extend to the renewed note; that the purchaser was not bound to look beyond the certificate of the Recorder of Mortgages; that plaintiff by surrendering the original note, without taking any steps to give notice to third persons of the mortgage claimed for his new note, gave the purchaser reason to believe that the original note and the mortgage were both extinguished; that nothing connects the second note with the mortgage; and that neither the note, nor the certificate of the notary, are such authentic evidence as authorize the issuing of an order of seizure and sale. *Levistone* v. *Bona*, 459.

6. Proceedings under an order of seizure and sale, cannot be arrested by a rule to show cause. Art. 739, *et seq.*, of the Code of Practice, point out the mode in which opposition to executory process may be made by the defendant in it, and art. 391, *et seq.*, of the same Code, and other laws, the means by which third persons may protect their rights. *Minot* v. *Bank of the United States*, 490.

FIDEI-COMMISSA.

See Donations Mortis Causa, 7.

FIERI FACIAS.

1. A Sheriff must, at his peril, avoid seizing under execution property not belonging to the defendant. It is not enough that he should presume, even on strong grounds, that it belongs to the latter; he must know it.

Duperron v. *Van Wickle*, 39.

2. One whose property is illegally seized under an execution against another person, is not bound, on being informed thereof, to give any notice to the Sheriff. He may, at once, seek relief by suit; unless, to avoid costs, he choose to make an amicable demand. And where the property has been sold by the Sheriff, he will be entitled to recover, not the price at which it was sold, but its real value at the time. *Ib.*

3. In an action by a third person, against the Sheriff and plaintiffs in execution, for the value of property belonging to such third person, illegally seized and sold, and the proceeds of which had been applied in satisfaction of the execution, it will be no defence on the part of such plaintiffs that they did not authorize the seizure. They are bound to indemnify those who have been injured by the party employed to make the amount of their execution. *Qui sentit commodum, debet sentire et onus. Ib.*

4. The purchaser at a Sheriff's sale cannot refuse to pay the price he has bid, on the ground that there existed mortgages on the property of an older date than that on which he purchased, or that the legal formalities have not been complied with, unless he has been disturbed in his possession, or has just reason to apprehend that he will be. C. P. 710

Collins v. *Daly*, 112.

5. Where one whose property has been seized under an execution against a third person notifies the Marshal or Sheriff that the property seized belongs to him, he will not, by omitting to take legal measures to prevent the sale, lose his recourse against the officer. *Wright* v. *Cain*, 136.

6. Under a *fieri facias* against the principal and surety on a twelve months bond, executed for the price of property sold under execution, the Sheriff may seize and sell the property of the principal, or of the surety, or of both, to the amount of the debt and costs. C. P. 719, 720.

Edwards v. *Walker*, 181.

7. A purchase by a deputy sheriff of property sold by himself under a *fieri facias*, is absolutely null. *McCluskey* v. *Webb*, 201.

8. An allowance made by a Court of Probates to one for services as an auditor of the accounts of a succession, may be seized under a *fieri facias*. C. P. 647. It cannot be considered as the salary of an office.

Vance v. *Lafferanderie*, 340.

9. Artice 1987 of the Civil Code declaring what rights cannot be made liable for the payment of debts, is repealed by art. 647 of the Code of Practice, so far as they are inconsistent with each other; under the latter the Sheriff may seize all sums of money due to the debtor in whatever right, unless for alimony or salaries of office. *Ib.*

10. The property of the principal cannot be seized under execution by a cre-

ditor, even to the extent of the consignee's privilege; the creditor of the consignee in such a case, must attach or seize the claim of his debtor in the hands of the consignor. *Montgomery* v. *Brander*, 400.

11. Defendants, commission merchants, having contracted to sell a quantity of cotton belonging to their principals, to a third person for cash, before payment of the price or delivery, plaintiffs seized, in the hands of such third party, under a *fi. fa.* in a judgment against defendants, all the property, rights and credits of the latter. *Held*, that the vendors not being bound to deliver the cotton until the price was paid (C. C. 2463,) nothing was seized; and that the vendee might have disregarded it, and have paid the price to defendants and received the cotton. *Ib.*

FRAUD.

See ATTACHMENT, 6. BILLS OF EXCHANGE AND PROMISSORY NOTES, 11. EVIDENCE, 45, 46, 47, 54. HUSBAND AND WIFE, 14. SALE, 9.

FOREIGN LAWS.

1. Where the laws of another State which should govern the case, are not in evidence, our own must prevail. *Van Wyck* v. *Hills*, 140.
2. Acts of the Legislature, or extracts from the executive minutes of another State, attested by the Secretary of State, and accompanied by a certificate from the Governor, under the great seal of the State, declaring that the person who attests them is the Secretary of State, and that his attestation is in due form, are sufficiently proved. *Philadelphia Bank* v. *Lambeth*, 463.

HUSBAND AND WIFE.

1. Art. 2367 of the Civil Code, after providing a legal mortgage in favor of the wife on all the property of the husband, for the reimbursement of her paraphernal property, where the husband has received the price of it, declares that she shall have a similar mortgage in case he should have disposed of her paraphernal property, in any other way, for his individual interest. The words "*or otherwise disposed of the same*" in that article refer to the paraphernal property itself, and not to its proceeds. The wife has a legal mortgage, for the reimbursement of her paraphernal funds, if the husband applies them to his own use, from whatever source he may have received them. *Johnson* v. *Pilster*, 71.
2. The effect of the renunciation of the community of *acquêts* by a wife, is to place the husband and wife in the same situation as if no community had ever existed between them; and all property, purchased during the marriage, will be considered as having been made on the husband's account, as much so as if made before the marriage. *Ib.*
3. The wife's mortgage for the reimbursement of her paraphernal property,

attaches as completely to property acquired by the husband, during coverture, as to that he possessed before; nor can it be inferred from the right given to him, as head of the community, to sell its effects without the consent of the wife, that, when he exercises that right, the property alienated is relieved from her mortgage. Like all other general mortgages, the wife's follows the property into the hands of the purchaser, but can only be enforced after discussing that remaining in the possession of the husband. *Ib.*

4. Art. 2367 of the Civil Code granting the wife a mortgage on all the property of her husband, for the reimbursement of her paraphernal property, where the amount has been received by the husband, or where it has been otherwise disposed of for his benefit, is not repealed by art. 3281 or 3317. *Ib.*

5. The mortgage of the wife on the property of her husband for her dotal and paraphernal rights, exists without being recorded. *Ib.*

6. Property purchased with the paraphernal funds of the wife, only becomes her separate property while she keeps the administration of her separate estate, and when the title is taken in her own name, either as a purchase with the funds which she administers herself, or as a *dation en payement* made to her by the debtor of a separate and paraphernal debt. *Rousse* v. *Wheeler*, 114.

7. Property purchased during marriage in the name of the husband and wife, though paid for in whole or in part by the funds of the wife, will belong to the community of *acquêts*, but subject to a charge, in her favor, for the amount by which the community may have been thereby benefitted; and she will have, as in the case of her paraphernal funds having been used by the husband for his individual benefit, a mortgage on all his property for the reimbursement thereof. C. C. 2367. *Ib.*

8. A wife cannot bind herself, *in solido*, with her husband, for a debt contracted during the marriage, on account of the community. C. C. 2412. *Ib.*

9. An assignment by the husband of a paraphernal debt due to the wife, in payment for property purchased in the name of the community, will be valid, where, by the contract of marriage, the administration of her paraphernal property is entrusted to him; but he will be responsible to her for the reimbursement of its amount. C. C. 2367. *Ib.*

10. Where a married man removes to this State from one in which the common law, except so far as modified by statute, prevails, by which the personal property of the wife vests in the husband by the marriage, and where slaves are movables by law, any slaves or other personal effects brought by him will be presumed to have belonged to him. It will be for the wife, or third persons, to destroy the presumption, by proof of title in themselves. *Penny* v. *Weston*, 165.

11. Where, in an action by a married woman, the petition alleges that she is authorized by her husband to sue, she will not be bound to prove the fact, unless specially denied; a general denial is not sufficient. Where her authority to sue is specially denied, she must establish it by evidence, before

she can compel the defendant to answer to the merits. C. P. 327, 333, 344. *Kent* v. *Monget*, 172.

12. Though it is well settled that dilatory and declinatory pleas must precede the *contestatio litis*, yet if the petition disclose a total want of legal right or authority to sue in the plaintiff, it may be acted on by the court below at any stage of the proceedings, though not pleaded: as where a married woman sues in her own name, without alleging that she is authorized by her husband. Such a defect could not be cured by any waiver on the part of the defendant. *Ib.*

13. Art. 2377 of the Civil Code which provides, that when the hereditary property of either of the spouses has been increased or improved during the marriage, the other shall be entitled to one-half of the value of such increase or amelioration, if proved to have been the result of the common labor or expense, does not contemplate, that to ascertain the value of such increase or improvement, every item of improvement shall be estimated separately, and the aggregate amount added to the estimation of the land. This would often be unjust, as the increased value of the property would, in many cases, be far from equal to the original cost of such improvements. The proper course is, to estimate the value of the hereditary property according to its value at the time of the dissolution of the community, but, if possible, in the situation in which it was at the time of the marriage, and then to inquire into its real value, with all the improvements existing thereon in the condition in which it was at the time of the dissolution of the community; and the difference between the two estimates will form the increase, for one-half of which the other spouse should be compensated on the settlement of the community. *Babin* v. *Nolan*, 278.

14. Where a wife has obtained against her husband, a judgment for the separation of property, and ascertaining the amount of her dotal and paraphernal rights, the creditors of the latter may still require her to prove her claims contradictorily with them, whenever they have reason to suspect that the separation has been made with a view to defraud them; but they must put her on her guard by alleging fraud and collusion. Where no such allegation is made, she will not be bound to prove her claims *aliunde*, nor can the correctness of the judgment, or the sufficiency of the evidence upon which it was rendered, be inquired into. *Brassac* v. *Ducros*, 335.

15. To secure a debt due to mortgagee, twelve lots of ground were mortgaged by the same act, but separately and specially, each lot as security for a fixed part of the debt; and the wife of the mortgagor renounced all her rights, actions, privileges, and mortgages on them. An order of seizure and sale having been obtained, lot No. 1, sold for more than the part of the debt for which it was mortgaged, while all the others sold for less than the sums for which they were mortgaged. In a contest between the wife and mortgagee: *Held*, that the wife must be considered as having renounced her rights only to the extent of the mortgage on each lot; and that the surplus realized by the sale of lot No. 1, cannot be claimed by the mortgagee, but must be ap-

plied to the satisfaction of the rights of the wife, after deducting its proportion of the costs of the sales, calculated according to the price it brought. *Ib.*

16. A wife who has renounced the community of *acquêts*, must be regarded as a third person in relation to sales of community property made during the marriage; and every thing done during the marriage in relation to the sale or alienation of property, must be viewed as done by the husband alone. *Ib.*

17. Immovables settled as dowry, cannot be alienated during the marriage, except in the cases provided for by arts. 2338, 2339, 2340, 2341, of the Civil Code. C. C. 2337. But when made in conformity to law the sale is definitive and irrevocable, forever freeing them from any dotal rights of the wife. *Montfort* v. *Her Husband*, 453.

18. The purchaser of dotal property legally alienated, has nothing to do with the investment of the proceeds; the husband alone has the administration of the dowry. C. C. 2330. All that the purchaser has to do is to pay the price to the husband, who may act alone for the preservation or recovery of the dowry. The proceeds stand in lieu of the property itself, and become dotal. C. C. 2327. If the husband fail to reinvest the dotal funds, the wife will have a legal mortgage on his immovables, and a privilege on his movables, for their restitution. C. C. 2355, 3287. *Ib.*

19. A wife, who has mortgaged her paraphernal property to secure the payment of a loan, which was received by her husband, and did not enure to her benefit, though appearing alone in the contract, as having borrowed the amount with the authorization of her husband, may show by parol the real character of the transaction, and exonerate herself.
Firemen's Insurance Company of New Orleans v. *Cross*, 408.

20. Under no circumstances can a wife become surety for her husband. The form of the contract will be disregarded. Those who treat with married women, must see that the obligations they contract turn to their advantage. *Ib.*

INJUNCTION.

1. Where an injunction has been obtained to stay proceedings under writs of *fi. fa.* issued at the suit of different parties, the latter will be entitled to sever in their defence, though the Sheriff may have levied on the same property to satisfy all the writs. *Borne* v. *Porter*, 57.

2. A District Court cannot arrest, by injunction, process issued from a Parish Court. *Ib.*

3. Injunctions, arresting summary proceedings, apparently authorized by the parties, are required by the Code of Practice, (arts. 740, 741, 751, 756,) to be tried summarily; but the parties cannot be deprived of any of the means of procuring evidence, within a reasonable delay. *Slidell* v. *Rightor*, 59.

INSOLVENCY.

1. Where the funds of an insolvent estate have remained on deposit in a bank, in which they were placed by the syndic in pursuance of law, any loss resulting from the depreciation of the notes of the bank, must be borne by the creditors; but where the funds so deposited were withdrawn by the syndic, without any order of court, when the notes of the bank were *at par*, and were re-deposited when depreciated, he will be made to account to the creditors for the value of the notes at *par*. He should have left the funds on deposit, until ordered to pay them out. Act of 13th March, 1837.

Montilly v. *His Creditors*, 142.

2. No appeal will lie, under ordinary circumstances, in favor of the syndic of the creditors of an insolvent, from an order to produce his bank book.

Perrault v. *His Creditors*, 396.

3. To annul a mortgage on the ground that it was executed *in tiempo inhabil*, and intended to secure to the mortgagee an illegal preference over the other creditors, it is not enough that the fact of insolvency be shown; knowledge of it must be brought home to the mortgagee. C. C. 1973, 1979, 1980. And the action to annul must be brought within one year from the date of the mortgage. Ib. 1982. *Barrett* v. *His Creditors*, 408.

4. Where one who has acted as curator of a succession, and failed to pay over funds which came into his hands as such, makes a voluntary surrender of his property to his creditors, under the act of 20th February, 1817, the surety on his bond as curator may oppose his surrender. C. C. 3026. The failure or neglect of a creditor to oppose the surrender, cannot operate a release of the surety. *Per Curiam:* The effect of the surrender was only to discharge the debtor from imprisonment; it did not release him from the payment of his debts. *Cougot* v. *Fournier*, 420.

5. Where, in an action to rescind a sale, on the ground that it was made with the view of giving a preference to certain creditors of the vendor, who is stated to be insolvent, the petition does not allege that the purchasers knew that their vendor was insolvent, and that the latter had not property sufficient to pay the debt of the petitioner, the sale cannot be avoided.

New Orleans Gas Light and Banking Company v. *Currell*, 438.

6. Art. 1982 of the Civil Code is applicable exclusively to a particular class of cases, in which the only alleged ground of nullity is, an undue preference given to one of the creditors of an insolvent; while art. 1989 applies to all other contracts by which creditors are injured. *Ib.*

INSURANCE.

1. A consignee with power to sell, has an insurable interest; and if the consignor afterwards assent, he will be responsible for the premium, and be entitled to the benefit of the policy.

Pouverin v. *Louisiana State Marine and Fire Insurance Company*, 234.

2. Where a vessel insured from New Orleans to Vera Cruz, on her way

through Lake Borgne, touches at the Bay of St. Louis for the purpose of procuring a pilot to conduct her through Pass Christian, it will not be a deviation. *Ib.*

INTERPRETATION.

1. Prior laws are repealed by subsequent ones, only in case of positive enactment, or clear repugnancy between their provisions. This rule established in relation to laws enacted at different periods, applies with greater force to the several parts of a code adopted about the same time.

Johnson v. *Pilster*, 71.

2. The seller is bound to explain himself clearly respecting the extent of his obligations; and any obscure or ambiguous clause will be construed against him. C. C. 2449. *Phillipi* v. *Gove*, 315.

INTERVENTION.

See APPEAL, 4. MINOR, 6.

JUDGMENT.

1. Every final judgment must be signed separately by the judge, after having been read in open court. C. P. 546. Until signed, it is not final. The signature must bear a precise date, as it would be otherwise impossible to ascertain from what day the mortgage, resulting therefrom when recorded according to law, would take effect. The signature of the minutes of the court, required to be kept by art. 777 of the Code of Practice, is not such a signature of the final judgments rendered by it as the Code requires. This signature of the minutes is merely to attest the correctness of the entries made by the clerk. *Ex parte Nicholls*, 52.

2. The execution of an act under private signature, by the purchaser of property at a succession sale, resold by order of the Probate Court on his failure to comply with the terms of sale, by which he consents to lease or buy the property from the second purchaser, is an acquiescence in the judgment divesting his title. *Landry* v. *Connely*, 127.

3. No appeal or action of nullity will lie against a judgment, which has been voluntarily executed by the party against whom it was rendered. C. P. 567, 612. *Ib.*

4. In joint actions all the debtors must be sued, and must remain in court till the end of the suit; and the judgment must be against each for his virile portion. *Van Wyck* v. *Hills*, 140.

5. Where the answer admits that a portion of the amount claimed is due, judgment may be obtained therefor, on motion, without a trial; and the case be left open, as to the part in dispute. *Small* v. *Zacharie*, 144.

6. Defendants admitting a part of the debt sued for to be due, pleaded a tender; and plaintiff having moved for a judgment for the amount so admitted,

it was rendered without a trial, for that sum, with costs, leaving the case open as to the balance of the claim: On appeal, *held*, that as to the costs, the judgment was premature; that being thrown by law on the party cast, they should not be taxed before the final determination of the suit; and that, should defendants prove the tender, and establish the other part of their defence, the costs must fall upon the plaintiff. *Ib.*

7. The validity of a judgment ordering the execution of a will, cannot be inquired into collaterally. *McCluskey* v. *Webb*, 201.

8. By the common law, where no execution has been taken out on a judgment for a year and a day, the judgment creditor may render his judgment executory, either by a *scire facias*, or an ordinary suit within twenty years. The remedy is cumulative. By the laws of this State where a judgment has the force, *rei judicatæ*, he may either obtain an order of seizure and sale, or bring an ordinary suit. C. P. 746, 748. *Pillet* v. *Edgar*, 274.

9. No execution can be issued in this State on a judgment rendered in another State which has ceased to be executory there, in consequence of no execution having been taken out within a year and a day after it was rendered. The courts of this State cannot enforce a judgment, which the court of the State in which it was rendered, cannot execute. *Ib.*

10. Where a wife has obtained against her husband, a judgment for the separation of property, and ascertaining the amount of her dotal and paraphernal rights, the creditors of the latter may still require her to prove her claims contradictorily with them, whenever they have reason to suspect that the separation has been made with a view to defraud them; but they must put her on her guard by alleging fraud and collusion. Where no such allegation is made, she will not be bound to prove her claims *aliunde*, nor can the correctness of the judgment, or the sufficiency of the evidence upon which it was rendered be inquired into. *Brassac* v. *Ducros*, 335.

JUDGMENT BY DEFAULT.

Where a judgment by default has been obtained on a claim exceeding five hundred dollars, it may be confirmed on the testimony of a single witness, the fact of the debt not being denied being a corroborating circumstance. The possession of the note sued on, may be also viewed as a corroborating circumstance. *Leeds* v. *Debuys*, 257.

See APPEAL, 18, 19.

JURY.

See COURTS, 7. PARTNERSHIP, 13.

LEASE.

1. Article 43 of the Code of Practice, which provides if the farmer or lessee of real estate be sued in any action, involving the title to real property, or

any immovable right to such property, "that he shall declare to the plaintiff the name and residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and must defend it in the place of the tenant, who shall be discharged," applies only where the lessor or owner of the property sued for resides in the State, or, being absent is represented therein; if the lessor reside out of the State, and is not represented therein, the lessee must defend the suit in his absence.

Plummer v. *Schlatre*, 29.

2. The privilege of the lessor on the movables found in the house, yields to that for the funeral expenses of the debtor and family, where there is no other source from which they can be paid; but it must be placed on the tableau of distribution immediately after such expenses.

Succession of Devine, 366.

3. Plaintiff leased from defendant an hotel, "with all the appurtenances, and all the household furniture and fixtures belonging to the same." The hotel was supplied with gas fixtures; but on application to the Gas Company, they refused to permit the introduction of any gas, on the ground that an amount was still due for gas supplied to a former tenant for which defendant was responsible, and that, according to their rules, no gas could be supplied to the building until the arrears were paid. Defendant having refused to pay the whole amount claimed by the company, a suit was pending to recover it. *Per Curiam.* The lease entitled plaintiff to call on the company for gas, on offering to pay for it; but nothing shows that defendant bound himself that such supply should be furnished. If the gas was improperly refused, plaintiff's remedy was against the company. The defendant caused him no injury by exercising his right of resisting a claim which he deemed illegal. *Scudder* v. *Paulding*, 428.

4. The omission of a lessor to make the necessary repairs to the premises, will not, where the rent is sufficient to enable the tenant to make them, authorize the rescission of the lease, or a suit for damages. Under art. 2664 of the Civil Code, the lessee may, on the refusal or neglect of the lessor, himself cause them to be made, and deduct the cost from the rent due, on proving that the repairs were indispensable, and the price paid by him just and reasonable. *Ib.*

LEVEES.

See ROADS AND LEVEES.

LIMITS, FIXING OF.

See SALE. 1. SURVEY.

LOAN.

Defendants, who were merchants, delivered to the plaintiffs, money brokers,

a certain sum in notes of the Bank of the United States, and received from the latter another sum in Louisiana Bank notes, with the understanding, that either party should be entitled to demand the return of a like amount of such notes as were originally delivered by them, on giving certain notice to the other. Plaintiffs, having offered to return the amount of notes received by them, after giving the notice agreed upon, demanded those which they had delivered to defendants; and, on the failure of the latter to restore them, notified them, that unless the amount was returned by a given time, they, (plaintiffs,) would sell the United States Bank notes for what they would bring in the market, and hold defendants responsible for the difference between the proceeds, and the value of the notes received by them. Plaintiffs sold the notes through a broker, and purchased them themselves, and sued for the difference. *Held*, that the real character of the transaction is one of mutual loans for consumption—an agreement by the parties to deliver to each other a certain number of bank notes to be used by them respectively, under the obligation of returning an equal amount of the same kind: that plaintiffs had no right to sell the notes as they did, nor to purchase them themselves; that on defendants' refusal to receive the notes, plaintiffs should have deposited them in some safe place, at the risk of the former, and have proceeded to recover the amount of notes delivered by them, under the provisions of arts. 2892 and 2893 of the Civil Code, at their value on the day when defendants should have restored them, according to the stipulations of the original agreement as to notice.

Egerton v. *Buckner*, 346.

LOST WRITINGS.

See EVIDENCE, XIII. PLEADING, 1.

LOUISIANA.

See TREATY OF PARIS.

MANDAMUS.

1. The writ of mandamus is given to the Supreme Court to enable it to command inferior courts to act, where delay would produce damage and injustice. *State* v. *Judge of the Commercial Court of New Orleans*, 48.
2. Where an inferior judge refuses to try a cause at issue between the parties, on the ground that others unknown, may be interested, and should be made parties, a mandamus will be granted to compel him to proceed. If those who are interested and informed of the proceedings, do not appear to protect their rights, they must bear the consequences; and those who are neither parties nor privies to the proceedings cannot be affected by the judgment. *State* v. *Judge of the Commercial Court of New Orleans*, 227.

MARSHAL.

See QUASI OFFENCES.

MINOR.

1. Silence for seventeen years, after the age of majority, will be considered a tacit ratification of the acts of the minor. The longest period of prescription for such acts is ten years. C. C. 2218. *Lea* v. *Myers*, 8.

2. Decision in the case of *The State* v. *The Judge of the Court of Probates of New Orleans*, 2 Robinson, 418, affirmed.
State v. *Judge of Probates of New Orleans*, 84.

3. Minor heirs, who have not accepted, must be considered (saving their right to accept at a future time,) as strangers to the succession.
Leonard v. *Fluker*, 148.

4. Under the provision of the Code of 1808, book 3, title, 1, art. 74, which declares that "until the acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect the deceased, who was the owner of the estate," prescription ran against a vacant succession, although minors were interested. *Ib.*

5. A change in the law by which prescription was allowed to run, under certain circumstances, against minors, will not deprive one interested in pleading it, of the benefit of the time elapsed before the repeal of the old law. The time so elapsed may be added to that since the majority of the party, to make out the necessary period of prescription. *Ib.*

6. Where the accounts of the tutor of a minor heir, presented to the Court of Probates for approval, are opposed by the latter, a co-heir may intervene in the proceedings, for the purpose of obtaining from their common tutor a legal settlement of their ancestor's estate. The cause of action is the same, and both claim in the same right. C. P. 389, 390.
Tutorship of Hacket, 290.

7. A minor who, after becoming of age, has accepted the accounts of his tutor and given him a receipt in full and discharge from all claims, may, within four years after her majority, institute a direct action against him respecting the acts of the tutorship, or oppose his discharge when applied for by him; and she will be relieved, on proof that she acted in ignorance of her rights. C. C. 355, 356, 1815, 1841. *Ib.*

8. Where the tutor of a minor, also the tutor of the minor heirs of a former tutor of the same minor, tenders in the Court of Probates, in his double capacity, his account to his late ward after his majority, it will be no objection, on an opposition by the latter, claiming a tract of land, or its proceeds omitted in the account, and alleged by the tutor to belong to the community which existed between the former tutor and the mother of the other minors, that the judgment, if in favor of the opponent, would be in substance against the heirs of such former tutor, who are not parties to the proceedings, and that the question is one of title, not within the jurisdiction of the Probate

Court. The minor heirs of the first tutor are represented by their tutor, the only person authorized by law to represent them; and the Court of Probates is empowered to determine questions of title, arising collaterally on the trial of other matters within its jurisdiction. *Ib.*

9. On an opposition to an account rendered by a tutor, a witness will be allowed to prove that the tutor told him that he had sold a slave belonging to his ward for a certain sum. *Per Curiam.* The testimony does not go to make out a sale or transfer of a slave, or to affect the title to one, but to establish the receipt of money by the tutor for property disposed of by him, for which he must account. *Ib.*

10. Where the property of minor heirs has been illegally sold, though not bound by the proceedings, they may on coming of age ratify the sale, and claim the proceeds. *Ib.*

11. A tutor is not chargeable with more than five per cent interest per annum, on funds received by him for his minor. Act of 19th February, 1825. *Ib*

12. A claim for a sum of money against a succession, should not be engrafte on a proceeding, the object of which is to call upon the heirs to declare whether they accept or refuse the estate. Where, under such a proceeding, the heirs of full age fail to answer whether they accept or renounce, they may be declared unconditional heirs, and liable to be sued as such. C. C. 1029. But as to minors, no judgment of any kind can be rendered against them. They can, under no circumstances, be considered as having accepted absolutely; (C. C. 346;) but must be regarded as heirs of age, accepting with the benefit of inventory. The succession should have been put under administration, as provided by art. 1040 of the Civil Code.

Picou v. *Dussuau*, 412.

MORTGAGE.

1. The laws in force prior to the promulgation of the Civil Code of 1825, relative to the recording of mortgages in the country parishes, provided that all acts of mortgage should be recorded in the office of the judge of the parish where the mortgaged property was situated. They required no separate record of mortgages to be kept, but directed that all notarial acts, whether creating mortgages or not, should be recorded in numerical order, in the same book. Acts of 24th March, 1810, and 26th March, 1815. Hence, where an act was passed before a Parish Judge, in his notarial capacity, relative to property in his parish, no further inscription was necessary to give effect, against third persons, to the mortgage resulting from it. By the Code of 1825, the duties previously prescribed only to the Register of Mortgages in New Orleans, were extended to the Parish Judges throughout the State. C. C. 3349, 3350, 3351, 3353, 3356.

Succession of Falconer, 5.

2. It is the registry, in the manner pointed out by law, which alone gives effect to a mortgage, as against third persons; as to them, it is valid, not as it has been executed between the parties, but as it has been recorded. It

is incumbent on the creditor who claims a preference over others, to give notice of his claim, in the manner pointed out by law. If he fail to ascertain that his mortgage has been correctly registered, he must suffer for the error, saving his recourse against the recorder. Creditors are not bound to look beyond the register itself, or the certificate which the recording officers are bound to make out. C. C. 3357. *Ib.*

3. Art. 2367 of the Civil Code, after providing a legal mortgage in favor of the wife on all the property of the husband, for the reimbursement of her paraphernal property, where the husband has received the price of it, declares that she shall have a similar mortgage in case he should have disposed of her paraphernal property, in any other way, for his individual interest. The words "*or otherwise disposed of the same*" in that article refer to the paraphernal property itself, and not to its proceeds. The wife has a legal mortgage, for the reimbursement of her paraphernal funds, if the husband applies them to his own use, from whatever source he may have received them. *Johnson* v. *Pilster*, 71.

4. The wife's mortgage for the reimbursement of her paraphernal property, attaches as completely to property acquired by the husband, during coverture, as to that he possessed before; nor can it be inferred from the right given to him, as head of the community, to sell its effects without the consent of the wife, that, when he exercises that right, the property alienated is relieved from her mortgage. Like all other general mortgages, the wife's follows the property into the hands of the purchaser, but can only be enforced after discussing that remaining in the possession of the husband. *Ib.*

5. Art. 2367 of the Civil Code granting the wife a mortgage on all the property of her husband, for the reimbursement of her paraphernal property, where the amount has been received by the husband, or where it has been otherwise disposed of for his benefit, is not repealed by art. 3281 or 3317. *Ib.*

6. The mortgage of the wife on the property of her husband for her dotal and paraphernal rights, exists without being recorded. *Ib.*

7. Property purchased during marriage in the name of the husband and wife, though paid for in whole or in part by the funds of the wife, will belong to the community of *acquêts*, but subject to a charge, in her favor, for the amount by which the community may have been thereby benefitted; and she will have, as in the case of her paraphernal funds having been used by the husband for his individual benefit, a mortgage on all his property for the reimbursement thereof. C. C. 2367. *Rousse* v. *Wheeler*, 114.

8. To secure a debt due to mortgagee, twelve lots of ground were mortgaged by the same act, but separately and specially, each lot as security for a fixed part of the debt, and the wife of the mortgagor renounced all her rights, actions, privileges, and mortgages on them. An order of seizure and sale having been obtained, lot No. 1 sold for more than the part of the debt for which it was mortgaged, while all the others sold for less than the sums for which they were mortgaged. In a contest between the wife and mortgagee: *Held*, that the wife must be considered as having renounced her rights

only to the extent of the mortgage on each lot; and that the surplus realized by the sale of lot No. 1, cannot be claimed by the mortgagee, but must be applied to the satisfaction of the rights of the wife, after deducting its proportion of the costs of the sales, calculated according to the price it brought. *Brassac* v. *Ducros*, 335.

9. The purchasers of property subject to a mortgage with the *pact de non alienando*, are not entitled to notice of an order of seizure and sale. The property is liable to be sold as if still in possession of the original mortgagor. *New Orleans Gas Light and Banking Company* v. *Allen*, 387.

10. To annul a mortgage on the ground that it was executed *in tiempo inhabil*, and intended to secure to the mortgagee an illegal preference over the other creditors, it is not enough that the fact of insolvency be shown; knowledge of it must be brought home to the mortgagee. C. C. 1973, 1979, 1980. And the action to annul must be brought within one year from the date of the mortgage. Ib. 1983. *Barrett* v. *His Creditors*, 408.

11. Plaintiff cannot contradict by parol evidence, an act of mortgage on which he sues; or prove anything beyond it. *Hill* v. *Hall*, 416.

12. Where notes secured by mortgage, delivered by the maker, have come again into his hands before maturity, the debt evidenced by them is extinguished by confusion. C. C. 2214. By re-issuing such notes, he may bind himself, but cannot revive the obligations of the other parties, nor the mortgage securing them, which being only an accessary to the debt between the maker and the payee, was extinguished with it. C. C. 3252, 3374. *Ib.*

13. The purchaser of dotal property legally alienated, has nothing to do with the investment of the proceeds; the husband alone has the administration of the dowry. C. C. 2330. All that the purchaser has to do is to pay the price to the husband, who may act alone for the preservation or recovery of the dowry. The proceeds stand in lieu of the property itself, and become dotal. C. C. 2327. If the husband fail to reinvest the dotal funds, the wife will have a legal mortgage on his immovables, and a privilege on his movables, for their restitution. C. C. 2355, 3287.
Montfort v. *Her Husband*, 453.

14. Defendant executed a mortgage on a slave to secure the payment of a note given to plaintiff, the act stipulating that the mortgagor should, on paying a part, be entitled to renew the note for the balance, for a limited time, but there was no provision extending the mortgage to the new note. There was a part payment, and renewal for the balance; plaintiff giving up to defendant the original note. Plaintiff afterwards presented the second note to the notary, and obtained from him a certificate that the original note had been presented to him, that plaintiff had declared that he had received the part payment and taken the second note in renewal, and that he, the notary, had *paraphed* it for the purpose of identifying it with the transaction. This certificate was not recorded at the Mortgage Office. Defendant sold the slave, under a certificate from the Recorder of Mortgages, that a mortgage existed on the slave to secure the payment of the first note. On an opposition by the purchaser to an order of seizure and sale taken out by plain-

tiff: *Held*, that the mortgage did not extend to the renewed note; that the purchaser was not bound to look beyond the certificate of the Recorder of Mortgages; that plaintiff, by surrendering the original note, without taking any steps to give notice to third persons of the mortgage claimed for his new note, gave the purchaser reason to believe that the original note and the mortgage were both extinguished; that nothing connects the second note with the mortgage; and that neither the note, nor the certificate of the notary, are such authentic evidence as authorize the issuing of an order of seizure and sale. *Levistone* v. *Bona*, 459.

15. A wife, who has mortgaged her paraphernal property to secure the payment of a loan, which was received by her husband, and did not enure to her benefit, though appearing alone in the contract, as having borrowed the amount with the authorization of her husband, may show by parol the real character of the transaction, and exonerate herself.

Firemens Insurance Company of New Orleans v. *Cross*, 508.

See NEW ORLEANS AND NASHVILLE RAIL ROAD COMPANY.

NEW ORLEANS AND NASHVILLE RAIL ROAD COMPANY.

The mortgage or privilege of the State, under the act of 13th March, 1837, to expedite the construction of the New Orleans and Nashville Rail Road, authorizing a loan to the Rail Road Company on the execution of a mortgage in favor of the State to secure its re-payment, does not extend to property acquired after the date of the mortgage.

State v. *New Orleans and Nashville Rail Road Campany*, 231.

NEW ORLEANS, CITY OF.

1. Under the provisions of the act of 3d April, 1832, regulating the opening and improving of streets and public places in the city of New Orleans and its suburbs, the court before which proceedings have been instituted, can, in no case, amend an assessment made by the commissioners. The report must be approved or rejected *in toto;* and in the last case, the court is bound either to appoint new commissioners, or to refer the whole matter back to the same. And on appeal, the Supreme Court can only pronounce such judgment as should have been given below, either rejecting or approving the report; it has no power to pronounce upon the rights of the parties, from the evidence in the record. *Application of Mayor &c. of New Orleans for the widening of Roffignac Street*, 357.

2. The act of 3d April, 1832, authorizing a municipal corporation to take the property of a citizen for public use, to be paid for by others supposed to be benefited thereby, being in derogation of the rights of property, must be strictly pursued. *Ib.*

3. Under the act of 3d April, 1832, proceedings instituted for the opening or

improvement of any street or public place may be discontinued, on the payment of costs, at any time before the final confirmation by the court of the report of the assessors. No rights are acquired, or titles divested, until the assessment has been approved by the court. Nothing in that act repeals the general provision of the Civil Code, art. 489, which declares that private property cannot be taken for public uses, without *previous* indemnity.
Ib.

NEW TRIAL.

1. A new trial may be prayed for after three judicial days have elapsed since the judgment was pronounced, provided it has not been signed. C. P. 546, 548. *Smelser* v. *Williams*, 152.
2. Decision in *Chandler et al.* v. *Barker*, 13 La. 316, overruled. *Ib.*
3. Where in an action to recover possession of plans, books, &c., there is a verdict for the restoration of certain plans and books, and in default thereof, condemning the defendant to pay a fixed sum, a new trial must be allowed, that the verdict may determine what sum shall be paid on failure to deliver each particular plan or book.
Commercial Bank of New Orleans v. *Stein*, 189.

NONSUIT.

1. Where the evidence is so contradictory, that the court cannot determine to whom the property in dispute belongs, the plaintiff must be nonsuited.
Turner v. *Lockwood*, 444.
2. Plaintiff, to whom a slave had been mortgaged by defendant, having seized the slave in the hands of a third person, the order of seizure and sale was enjoined by the latter; and the opposition, being tried in the absence of the opponent's counsel, was dismissed, and the injunction dissolved. Another writ of seizure and sale having been issued, was again opposed by the same party. *Held*, that the dismissal on the first trial must be viewed as a nonsuit, and not as furnishing ground for the plea of *res judicata*, the opponent occupying the position of a plaintiff, and being bound to support his opposition by proof. *Levistone* v. *Bona*, 459.

NOTARY.

See Bills of Exchange and Promissory Notes, 4, 5, 6, 7, 8, 9, 22.

NOVATION.

1. Action on certain bills protested for non-payment. Defence that plaintiff had agreed to renew the bills for three months from maturity, and proof of that fact and of tender by defendants of notes for the renewal. *Held*, that

the obligation under the original bills was extinguished by novation, and that plaintiff could not recover, even with a stay of execution, till the expiration of the three months. *Benedict* v. *Stow*, 390.

2. The renewal of a note and mortgage between the same parties, though the interest which has accrued be added to the principal, is no novation—it is but a continuance of the same transaction. Novation is the substitution either of a new creditor, a new debtor, or a new debt. C. C. 2185. The pre-existent obligation must be extinguished; if only modified, and any stipulation of the original obligation remains, there is no novation. Ib. 2183. *Rosenda* v. *Zabriskie*, 493.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE.

PARTIES.

See PLEADING, II.

PARTNERSHIP.

1. One partner cannot sue another for any sum paid for the partnership, or any funds placed in it, until a final settlement, and then only for the balance which may be due. *Johnson* v. *Marshall*, 157.

2. A restriction on the power of a partner to use the name of the firm in the usual course of trade, will be without effect, as to third persons without notice. Not even fraud on the part of one partner will be any defence for his co-partners, where the obligation was contracted in the usual course of their trade, and the fraud was not participated in by the creditor. *Harrison* v. *Poole*, 193.

3. The execution of a note raises a presumption that a just consideration has been given for it; and the maker who pleads error or failure of consideration, must show it; but where one partner is sought to be made liable on a note given by the other, and he alleges fraud and want of consideration, and shows circumstances somewhat suspicious, the burden of proving the consideration will be on the plaintiff. *Ib.*

4. The provision of the tenth section of the act of 28th March, 1840, abolishing imprisonment for debt, that the failure by a debtor "to pay over money received, or collected for, or deposited with him for another," shall be held presumptive evidence of fraud, cannot be applied to the case of a partner who has received and refuses to pay over money belonging to the partnership, and who is not liable for any specific sum, but only to account as a managing partner. It applies to those only who, having received money for another, without authority to dispose of it, fail to pay it over to the right owner. *Hanna* v. *Auter*, 221.

5. Action on a draft in favor of plaintiff, drawn by defendant on a person with

whom he was connected as a partner in planting. This partner being much in debt, had conveyed to the intervenor, by a deed of trust, executed in another state, his entire interest in the plantation and slaves, for the purpose of applying the crops to the payment of his debts. The intervenor was in possession under the deed, with the knowledge of defendant, though the latter was not a party to the instrument. Plaintiff having attached a part of the crop made by the intervenor on the plantation: *Held*, that the latter cannot be deprived by the creditors of either partner, of any part of the crop, until all the expenses of his management of the plantation have been reimbursed, and that the plaintiff could attach in the hands of the intervenor, only the balance due to defendant on a settlement of accounts.

Endicott v. *Scott*, 265.

6. Where the fact of a partnership is clearly shown, and that the bills of exchange sued on were drawn for the purpose of carrying on the business contemplated by the parties, plaintiffs will not be required to show, that they knew of the existence of the partnership when they took the bills.

Robertson v. *De Lizardi*, 300.

7. Where for a limited period, and in relation to a particular branch of commerce, defendants were to buy and sell on joint account, and to participate in the profits, they become, as to third persons, partners in relation to that trade. *Ib.*

8. There are cases in which the parties, though not partners *inter se*, will be held liable as such towards third persons. *Ib.*

9. Where the stockholder of a bank gives a note to the institution, even for the re-payment of a sum he was entitled to borrow, under its charter, the claim of the bank against him, is similar to that against any other borrower; and the obligation of the stockholder, results rather from his note, than from any relations as a partner in the bank. He cannot, consequently, where his domicil is in another parish, be cited before the tribunals of the place where the bank is established, under art. 165, No. 2, of the Code of Practice, relative to suits against partners.

Union Bank of Louisiana v. *Lattimore*, 342.

10. When a partnership has been once formed, no third person can be subsequently admitted into the firm, without the concurrence of all the original members. One attempted to be admitted otherwise, becomes only the partner of him who attempts to admit him. *Fearn* v. *Tiernan*, 367.

11. The publication in a newspaper by a third person, that he is a member of a commercial partnership, cannot be considered as an act emanating from any of the partners and giving credit to such person, unless knowledge of the publication be brought home to the partner sought to be charged. To render the latter responsible for the acts of such third person, it must be proved that credit was given to the partner, and that he tacitly acquiesced therein. Nor will the payment by the firm of acceptances by such third person made in their name, prove any thing against such partner, where it is shown that he was absent from the place of business of the firm until after its dissolution. *Ib.*

12. In an action between partners for the final settlement, and partition of the effects of the partnership, no power which may have been conferred during its progress on any one of the partners as a receiver, or for liquidating the affairs of the concern, can change their relative position and ultimate responsibilities towards each other. *Gridley* v. *Conner*, 445.

13. A partner cannot single out a particular transaction, and obtain a judgment against his co-partner thereupon. He can only require a final liquidation of the affairs of the partnership, and for this purpose any one of them may require, that all the matters in controversy shall be decided upon by a jury. *Ib.*

14. The act of 13th March, 1837, ch. 66, relative to limited or anonymous partnerships, does not apply to corporations, but to private associations of individuals. *Frazier* v. *Willcox*, 517.

PAYMENT.

1. A payment made in error may be recovered back, where such error, though the fault of the plainiff, has not injured the party to whom the payment was made. *Massias* v. *Gasquet*, 137.

2. As a general rule no one will be presumed to have paid what he was not bound for; and where he reclaims an amount so paid, the burden of proving that he was neither legally nor morally bound therefor, will be on him. *Urquhart* v. *Gove*, 207.

3. A contract or payment made for the purpose of avoiding litigation, cannot be rescinded for error of law. C. C. 1840. *Ib.*

PLEADING.

I. *Petition and Amendments thereto.*
II. *Parties to Actions and who may Sue or be Sued.*
III. *Exceptions and Answer.*
IV. *Demand in Reconvention.*
V. *Admissions.*

I. *Petition and Amendments thereto.*

1. It is not necessary in an action on a lost title, that the petition shall state such title. *Adams* v. *McCauley*, 184.

2. Where an attachment has been set aside on account of the insufficiency of the bond, the plaintiff may take out another attachment without filing a new petition, or having paid the costs of the first. Art. 492 of the Code of Practice does not apply to such a case. *Harrison* v. *Poole*, 193.

3. Where a wife has obtained against her husband, a judgment for the separation of property, and ascertaining the amount of her dotal and paraphernal rights, the creditors of the latter may still require her to prove her

claims contradictorily with them, whenever they have reason to suspect that the separation has been made with a view to defraud them; but they must put her on her guard by alleging fraud and collusion. Where no such allegation is made, she will not be bound to prove her claims *aliunde*, nor can the correctness of the judgment, or the sufficiency of the evidence upon which it was rendered, be inquired into. *Brassac* v. *Ducros*, 335.

4. Where, in an action to rescind a sale, on the ground that it was made with the view of giving a preference to certain creditors of the vendor, who is stated to be insolvent, the petition does not allege that the purchasers knew that their vendor was insolvent, and that the latter had not property sufficient to pay the debts of the petitioner, the sale cannot be avoided.

New Orleans Gas Light and Banking Company v. *Currell*, 438.

5. Action by plaintiffs for a balance due them as agents of defendant, for disbursements made for the use of a steamer, alleged to belong to the latter. Answer by defendant, denying the disbursements, and alleging that the boat was owned by plaintiffs and himself in partnership. A jury having found that a partnership existed, plaintiffs, in a supplemental petition, asked to change their original prayer into one for an account and settlement of all the affairs of the partnership, and for a judgment for the balance due them. *Held*, that the supplemental petition should have been rejected, as altering the nature of the original demand. C. P. 419. *Beard* v. *Call*, 466.

II. *Parties to Actions and who may Sue or be Sued.*

6. Article 43 of the Code of Practice which provides if the farmer or lessee of real estate be sued in any action, involving the title to real property, or any immovable right to such property, "that he shall declare to the plaintiff the name and residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and must defend it in the place of the tenant, who shall be discharged," applies only where the lessor or owner of the property sued for resides in the State, or, being absent, is represented therein; if the lessor reside out of the State, and is not represented therein, the lessee must defend the suit in his absence.

Plummer v. *Schlatre*, 29.

7. Plaintiff having made a surrender of his property under the insolvent laws of the State, subsequently applied to the District Court of the United States to be declared a bankrupt under the act of Congress of 1841. Previous to the latter application, his wife, who had obtained a judgment against him, had levied a *fi. fa.* on a claim belonging to the insolvent, alleged to have formed a part of the property given up to his creditors, at the time of his surrender under the insolvent laws of the State. The syndic appointed under the State laws, having taken a rule upon plaintiff to show cause why he should not deliver to him the certificate of the claim, and neither the assignee under the act of Congress, nor the wife of the insolvent having been made parties: *Held*, that the case must be remanded that the question which of the creditors are entitled to claim, may be decided contradictorily with the assignee, and the wife. *West* v. *His Creditors*, 88.

8. In joint actions all the debtors must be sued, and must remain in court till the end of the suit; and the judgment must be against each for his virile portion. *Van Wyck* v. *Hills*, 140.

9. One partner cannot sue another for any sum paid for the partnership, or any funds placed in it, until a final settlement, and then only for the balance which may be due. *Johnson* v. *Marshall*, 157.

10. Where by the death of a minor child, its mother becomes seised of all the rights of the former to the succession of the father, no preliminary steps are required to be taken by the mother, in the nature of an *additio hæreditatis* to complete her right, in order to commence an action against the other heirs for a partition of the succession. *Penny* v. *Weston*, 165.

11. An action of debt against an heir may be premature, before he has signified his intention to accept the succession, and in an action of partition, under such circumstances, the defendant might disclaim; but the plaintiff is not bound, in the first instance, to institute any proceeding to compel him to assume the quality of heir. *Ib.*

12. Where the accounts of the tutor of a minor heir, presented to the Court of Probates for approval, are opposed by the latter, a co-heir may intervene in the proceedings, for the purpose of obtaining from their common tutor a legal settlement of their ancestor's estate. The cause of action is the same, and both claim in the same right. C. P. 389, 390.

Tutorship of Hacket, 290.

13. Parties interested in a debt or other property, may appoint agents to take care of their interest, and vest them with all necessary powers. C. C. 2954, *et seq.*; and an action may be maintained in the name of the agent, as well as in that of the principal, if power to that effect be given.

Frazier v. *Willcox*, 517.

14. The capacity of a foreign corporation to sue, is well established. *Ib.*

III. *Exceptions and Answer.*

15. Where an injunction has been obtained to stay proceedings under writs of *fi. fa.* issued at the suit of different parties, the latter will be entitled to sever in their defence, though the sheriff may have levied on the same property to satisfy all the writs. *Boone* v. *Porter*, 57.

16. Where respondents allege, "that they tendered to the plaintiff about, or at the maturity of the note, the sum" which they admit to be due, but without stating the manner in which the tender was made, or showing that the money was deposited as required by law, or denying the amicable demand and refusal to pay set forth in the petition, the plea will be considered informal and insufficient, and interest be allowed on the whole amount until finally paid. *Small* v. *Zacharie*, 144.

17. Where, in an action by a married woman, the petition alleges that she is authorized by her husband to sue, she will not be bound to prove the fact, unless specially denied; a general denial is not sufficient. Where her authority to sue, is specially denied, she must establish it by evidence, before

she can compel the defendant to answer to the merits. C. P. 327, 333, 344. *Kent* v. *Monget*, 172.

18. Though it is well settled that dilatory and declinatory pleas must precede the *contestatio litis*, yet if the petition disclose a total want of legal right or authority to sue in the plaintiff, it may be acted on by the court below at any stage of the proceedings, though not pleaded; as where a married woman sues in her own name, without alleging that she is authorized by her husband. Such a defect could not be cured by any waiver on the part of the defendant. *Ib.*

19. Where a defendant has appeared by counsel and joined issue on the merits, objections to the steps taken to bring him into court will be disregarded. *Harrison* v. *Poole*, 193.

20. A general denial will place the *onus* of proving notice of protest on the plaintiff, who must establish that such notice was sent to the post office, nearest to defendant's residence, whether in the same or another State; and the latter may, under the general issue, show that the office to which it was sent was not the nearest. *Pollard* v. *Cook*, 199.

21. An exception that the petition and citation were not drawn or served in the French language, the maternal tongue of the defendant, must be pleaded *in limine litis*, or it will be considered as waived. It will be too late after a judgment by default has been confirmed, though the judgment of confirmation has not been signed. *Leeds* v. *Debuys*, 257.

22. The exception that a suit is premature, is a dilatory one, which must be pleaded *in limine litis*. It is too late after a judgment by default. *Benedict* v. *Williams*, 392.

IV. *Demand in Reconvention.*

23. Under the 7th section of the act of 20th March, 1839, amending article 375, of the Code of Practice, a demand in reconvention may be instituted for any cause, though not necessarily connected with or incidental to the main action, where the plaintiff resides out of the State, or in a different parish from the defendant. *Mayo* v. *Savory*, 1.

V. *Admissions.*

24. Where the answer admits that a portion of the amount claimed is due, judgment may be obtained therefor, on motion, without a trial; and the case be left open, as to the part in dispute. *Small* v. *Zacharie*, 144.

25. The rule that a party, wishing to avail himself of the admissions of his adversary, cannot divide them, but must take them entire, does not apply to admissions in the pleadings; but only to answers to interrogatories (C. P. art. 356,) or to judicial confessions made according to art. 2270 of the Civil Code. Thus, where the debt is acknowledged, but a tender of the amount alleged, the plaintiff will be exempted from the necessity of proving his claim; but as a matter of defence, the tender must be established by legal evidence, like any other fact tending to show a discharge from the obligation sued on. *Ib.*

POLICE JURY.

Where the inspector of roads and levees has failed to give to the absent proprietor the notice required by law of the work to be done on his levees, &c., without which the contractor to whom it has been adjudicated cannot proceed summarily to seize and sell the land, the latter may recover the amount at once of the Police Jury. Though the proprietor might be responsible in an ordinary action on a *quantum meruit*, the contractor is not bound to sue him. *Newcomb* v. *Police Jury of East Baton Rouge*, 233.

POPE.

See CATHOLIC CHURCH. CHURCH OF ST. FRANCIS OF POINTE COUPÉE, 2.

POSSESSION.

The legatee of a particular object will not be presumed to be cognizant of any defect of title in the testator, but be regarded as a possessor in good faith. *Sides* v. *Nettles*, 170.

See ACT SOUS SEIGN PRIVÉ.

POST OFFICES.

Post offices in the United States are established by law; and no evidence is required of what the law is. *Pollard* v. *Cook*, 199.

PRESCRIPTION.

1. The rule, *Quæ temporalia sunt ad agendum, sunt perpetua ad excipiendum*, applies only where a defendant is in the exercise of the right, or in possession of the property or position, attempted to be taken from him. It cannot protect a party who has remained silent, and suffered a purchaser to keep possession during the period required to prescribe an action of rescission. *Lea* v. *Myers*, 8.

2. Silence for seventeen years, after the age of majority, will be considered a tacit ratification of the acts of a minor. The longest period of prescription for such acts is ten years. C. C. 2218. *Ib.*

3. The prescription of one year, established by article 3499 of the Civil Code as to "retailers of provisions and liquors," is applicable only where supplies have been furnished for family use, and not to articles sold to shopkeepers. *Allen* v. *Terry*, 22.

4. The prescription of five years, established by sect. 4 of the act of 10th March, 1834, entitled, "an act relative to advertisements," as to "all in-

formalities connected with or growing out of any public sale by a parish judge, sheriff, auctioneer, or other public officer," applies only to such informalities as relate to the manner, time, and place of making the advertisements required by law for public sales, and not to all illegalities or nullities whatsoever. *Morton* v. *Reynolds*, 26.

5. Under the provisions of the Code of 1808, book 3, title 1, art 74, which declares that "until the acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect the deceased, who was the owner of the estate," prescription ran against a vacant succession, although minors were interested. *Leonard* v. *Fluker*, 148.

6. A change in the law by which prescription was allowed to run, under certain circumstances, against minors, will not deprive one interested in pleading it, of the benefit of the time elapsed before the repeal of the old law. The time so elapsed may be added to that since the majority of the party, to make out the necessary period of prescription. *Ib.*

7. The redhibitory action must be instituted within a year from the date of the sale; the only exceptions to this rule being, where the vendor knew of the vice and neglected to declare it to the purchaser; or, not being domiciliated in the State, absented himself before the expiration of the year following the sale, when the prescription remains suspended during his absence. C. C. 2512. *Ogden* v. *Michel*, 155.

8. A bequest by testament duly proved and ordered to be executed, is a title translative of property, as much as a donation *inter vivos*. C. C. 3451. *Sides* v. *Nettles*, 170.

9. To acquire by the prescription of ten years, it is not enough to show a title translative of property, accompanied by possession for ten or twenty years. Good faith is essential, and must have existed at the commencement of the possession. Code of 1808, p. 488, art. 72. Such good faith does not consist in the belief only, that the person whose rights are acquired was the real owner of the property. This is indispensable to constitute good faith on the part of the purchaser; but, even where it exists, there may be bad faith in the latter, as where a deputy sheriff purchases property sold by himself under a *fieri facias*. He knows the vices of his title; and does not, according to art. 495 of the Civil Code, possess as owner by virtue of an act sufficient in terms to transfer the property, of the defects of which he was ignorant. *McCluskey* v. *Webb*, 201.

10. Where a title is absolutely null, it cannot be the basis of prescription. *Aliter*, as to relative nullities. If those in whose favor they are established do not complain, prescription may be acquired under a title containing such relative nullities. *Ib.*

11. The prescription of five years, established by the act of 10th March, 1834, applies only to informalities in the manner of advertising and making public sales. *Ib.*

12. A minor who, after becoming of age, has accepted the accounts of his tutor, and given him a receipt in full and discharge from all claims, may, within four years after her majority, institute a direct action against him re-

specting the acts of the tutorship, or oppose his discharge when applied for by him; and she will be relieved on proof that she acted in ignorance of her rights. C. C. 355, 356, 1815, 1841. *Tutorship of Hacket*, 290.

13. Plaintiff having paid A. the amount of a judgment, for which he had become liable, as surety of B. on an appeal bond, obtained in February, 1842, a judgment subrogating him to all the rights of A.; who, in December, 1840, had recovered judgment against defendant, as surety of B., on a bail bond executed at the beginning of the original suit, sued to revoke a sale made by defendant in December, 1840, as fraudulent; *Held*, that the prescription of one year, established by art. 1989 of the Civil Code, must bar any action against defendant, by A.; that plaintiff, being subrogated to A.'s rights, can have no greater rights than he had; that the judgment of subrogation, of February, 1842, is not one rendered against the defendant, within the meaning of art. 1989; and that the prescription did not commence to run from its date, but from that of the judgment of A. against the defendant, obtained in December, 1840. *Walker* v. *Vaudry*, 395.

PRESUMPTION.

See EVIDENCE, V.

PRIVILEGE.

1. The privilege of the lessor on the movables found in the house, yields to that for the funeral expenses of the debtor and family, where there is no other source from which they can be paid; but it must be placed on the tableau of distribution immediately after such expenses.

Succession of Devine, 366.

2. Where a vendor allows the things on which he has a privilege, to be sold confusedly with a mass of other things belonging to his vendee, without making his claim, the privilege will be lost. C. C. 3175.

Bonnabel v. *Rdbeneau*, 419.

3. If the husband fail to reinvest funds received from the sale of dotal property, the wife will have a legal mortgage on his immovables, and a priviledge on his movables, for their restitution. C. C. 2355, 3287.

Montfort v. *Her Husband*, 453.

See ATTACHNENT, 6.

PROHIBITION.

1. The power to issue writs of prohibition was conferred on the Supreme Court merely as a means of enabling it to exercise its appellate jurisdiction. Like the writ of mandamus, a prohibition may be issued even where a party has other means of redress, if the slowness of ordinary legal proceedings be likely to produce such immediate injury as ought to be prevented.

State v. *Judge of Commercial Court of New Orleans*, 48.

2. The writ of mandamus is given to enable the Supreme Court to command inferior courts to act where delay would cause damage and injustice; and the writ of prohibition to restrain them, where their acting without authority would produce similar results. *Ib.*

3. The writ of prohibition is an extraordinary one, and should be issued only in cases of great necessity, clearly shown, and where the party has applied, in vain, to the inferior tribunals for relief. *Ib.*

PROVISIONAL SEIZURE.

On a rule to show cause, why a writ of provisional seizure should not be set aside, evidence will be inadmissible to establish facts, alleged as grounds for the rule, which belong to the merits of the case, or relate to the truth of the affidavit, which no law authorizes the defendants to disprove.

McCarty v. *Lepaullard*, (2d case,) 425.

PUBLIC LANDS OF THE UNITED STATES.

1. Decision in case of *Thompson* v. *Schlatre*, 13 La. 115, affirmed.

Combs v. *Dodd*, 58.

2. Where the proclamation of the President, offering a portion of the public lands of the United States for sale, is produced together with patents to a purchaser at such sale, the court will not look beyond them to ascertain whether the lands had been regularly surveyed. *Ib.*

3. Decision in the case of *Kittridge* v. *Breaud*, 2 Robinson, 40, affirmed.

Kittridge v. *Breaud*, 79.

4. It is not necessary to the validity of a purchase of public lands from the government of the United States, under the laws relating to back-lands, that the lands purchased should be described by the township, range, and section. *Ib.*

5. The title of a purchaser from the United States of a portion of the public domain, will not be affected by the omission of the Register of the Land Office to mark the sale on the township plat in his office, or by a subsequent sale of the same lands, through error, to another. *Ib.*

6. Where one entitled by law to a preference in the purchase of a particular piece of the public lands of the United States, in the exercise of his right, pays the price and receives from the proper officer a receipt for the same, with a certificate that he is entitled to purchase the land, the sale will be complete, though the evidence of it may not have been made out in the prescribed form. *Ib.*

7. The act of Congress of 5th May, 1830, authorizing the Registers of the Land Offices in Louisiana to receive entries of lands in certain cases, was passed for the relief of a class of persons who had paid to a Receiver the price of the lands they intended to purchase, but had not presented their receipts to the Register for his certificate, until too late to exercise their

rights. It is inapplicable to cases where the application to purchase had been made to the Register, who admitted the applicant's right. *Ib.*

8. In a contest between parties claiming lands sold by the United States, the courts of this State, whose powers are not limited by any distinction between law and equity, will look to the facts of the case, and do justice between the parties, though a patent may have been issued to one of them. The principle is well settled in the jurisprudence of this State, and in that of the courts of the United States, that an equitable right, originating before the date of the patent, whether founded on an earlier entry or otherwise, may be inquired into. *Ib.*
9. The acts of Congress conferring pre-emption rights on the settlers on the public lands, vest a legal title in the purchaser as soon as the purchase is made and the price paid: and the United States cannot take back the land nor sell it to another. *Ib.*
10. A sale of a portion of the public lands of the United States, made in pursuance of an act of Congress, conferring authority for that purpose on the Register and Receiver of Public Moneys, will divest the government of its title. *Ib.*
11. One who obtains a patent from the United States for a portion of the public lands, by suppressing a part of the facts of the case, will not be permitted to benefit himself thereby. The patent will enure to the benefit of the party entitled to recover the land. *Ib.*

QUASI CONTRACTS.

In the absence of any privity between plaintiff and defendant, a very strong case must be made out to justify the application of the maxim, that no man should be permitted to enrich himself at the expense of another, as a ground of recovery. Even among those who have dealt with each other, one may sometimes receive the benefit of the labor or expense of another without being bound to pay for it, as where a tenant has made improvements without authority from his lessor. *McWilliams* v. *Hagan*, 374.

QUASI OFFENCES.

Where one whose property has been seized under an execution against a third person, notifies the Marshal or Sheriff that the property seized belongs to him, he will not, by omitting to take legal measures to prevent the sale, lose his recourse against the officer. *Wright* v. *Cain*, 136.

RECEIVER.

The judges of the inferior courts cannot, of their own accord, appoint receivers for the purpose of collecting or keeping funds, or evidences of debt which may be the subject of litigation before them. Such appointments can be

made only with the consent of all the parties interested, and the assent of the judge can add nothing to the powers of the persons so appointed.

Frazier v. *Willcox*, 517.

See AGENCY, 7.

RECONVENTION.

See PLEADING, IV.

RECUSATION OF JUDGE.

1. Article 337 of the Code of Practice, which provides that the defendant may refuse to have his case tried by the judge before whom he has been sued, on account of the relationship existing between the judge and the plaintiff, was intended for the benefit and protection of the defendant; and where the latter waives his right of recusation, the party in whose favor a bias was supposed to exist, will not be permitted to exercise it.

Bonnefoy v. *Landry*, 23.

2. Cases in which the judge has recused himself, transferred in pursuance of the act of 27th February, 1841, ch. 32, from the Court of Probates, to be tried before the special judge provided by that act, sitting in the District Court, are to be tried in the same manner as if they had not been removed. The law, having made no provision for a trial by jury in the Court of Probates, none can be allowed in any such case by the special judge.

Penny v. *Weston*, 165.

REGISTRY.

See MORTGAGE, 1, 2, 6, 14.

RESCISSION, ACTION OF.

See SALE, IV.

RES JUDICATA.

1. A judgment rendered in an action commenced against a party in possession, who disclaims title, and cites his lessor to defend the suit, where the latter does not appear, will form *res judicata* only as to the possession; the question of title will be still open. *Morton* v. *Reynolds*, 26.

2. Where the damages awarded to the plaintiff, in an action instituted by him against an attorney of defendants, they being cited in warranty, for the amount stipulated to be paid to plaintiff in an agreement signed by defendants and plaintiff, and lent by the latter to the attorney, and not returned, were only for the temporary conversion of the agreement, which was pro-

duced on the trial, the signatures torn off, the judgment will be no bar to an action against defendants to enforce the agreement itself.

Story v. *Luzenberg*, 240.

3. Plaintiff, to whom a slave had been mortgaged by defendant, having seized the slave in the hands of a third person, the order of seizure and sale was enjoined by the latter; and the opposition, being tried in the absence of the opponent's counsel was dismissed, and the injunction dissolved. Another writ of seizure and sale having been issued, was again opposed by the same party. *Held*, that the dismissal on the first trial must be viewed as a non-suit, and not as furnishing ground for a plea of *res judicata*, the opponent occupying the position of a plaintiff, and being bound to support his opposition by proof. *Levistone* v. *Bona*, 459.

ROADS AND LEVEES.

Where the inspector of roads and levees has failed to give to the absent proprietor the notice required by law of the work to be done on his levees, &c., without which the contractor to whom it has been adjudicated cannot proceed summarily to seize and sell the land, the latter may recover the amount at once of the Police Jury. Though the proprietor might be responsible in an ordinary action on a *quantum meruit*, the contractor is not bound to sue him. *Newcomb* v. *Police Jury of East Baton Rouge*, 233.

RULE TO SHOW CAUSE.

1. Where the matters to be investigated are necessarily connected with and incidental to a main action, or a direct consequence of it, proceedings by a rule to show cause, in a summary way, are often convenient and legal; but such a mode of proceeding will not be permitted to supplant the regular rules of practice, or tolerated when intended to evade the plain provisions of law, by obtaining indirectly, what could not be obtained by a direct action. *White* v. *The Commissioners of the Merchants Bank of New Orleans*, 363.

2. The Merchants Bank of New Orleans, having surrendered its charter, under the act of 14th March, 1842, ch. 98, providing for the liquidation of banks, a judgment dissolving the corporation was rendered, commissioners appointed to close its affairs, and all judicial proceedings against it stayed. Plaintiffs having obtained a rule on defendants, to show cause why certain checks drawn by, or on the bank, should not be received by the commissioners in compensation of a debt of plaintiffs to the bank, and the evidence of such debt given up: *Held*, that the act having declared that, in all matters not otherwise provided for, the proceedings for the liquidation of the banks shall be the same as those prescribed in the acts relative to the voluntary surrender of property, and no especial provision having been made, the rule must be discharged. *Ib.*

3. On a rule to show cause why a writ of provisional seizure should not be set aside, evidence will be inadmissible to establish facts, alleged as

grounds for the rule, which belong to the merits of the case, or relate to the truth of the affidavit, which no law authorises the defendants to disprove.
McCarty v. *Lepaullard*, (2d case,) 425.

4. Proceedings under an order of seizure and sale, cannot be arrested by a rule to show cause. Art. 739, *et seq.*, of the Code of Practice, point out the mode in which opposition to executory process may be made by the defendant in it; and art. 395, *et seq.* of the same Code, and other laws, the means by which third persons may protect their rights.
Minot v. *The Bank of the United States*, 490.

SALE.

I. *Contract of Sale—Its Form and Requisites.*
II. *Obligations and Privilege of Vendor.*
III. *Obligations of Vendee.*
IV. *Rescission.*
V. *Judicial, and other Public Sales.*

I. *Contract of Sale—Its Form and Requisites.*

1. Where the proprietor of two estates has alienated one of them, in any contest as to the property, the limits assigned by the vendor at the time of the sale, and not the ancient boundaries, must be consulted. C. C. 840.
Orillion v. *Slack*, 120.

2. An obligation, though null and void *ab initio*, may be ratified or confirmed expressly or tacitly, verbally, in writing, or by acts manifesting clearly such an intention, or even, in some cases, by silence. C. C. 2252.
Landry v. *Connely*, 127.

3. Parol evidence is inadmissible to prove a sale of real estate.
Smelser v. *Williams*, 152.

4. The seller is bound to explain himself clearly respecting the extent of his obligations; and any obscure or ambiguous clause will be construed against him. C. C. 2449. *Phillipi* v. *Gove*, 315.

5. The decision in *Doubrere* v. *Grillier's Syndic*, 2 Mart. N. S. 171, that an act *sous seign privé* will have effect against third persons from its date, if possession accompanied or followed its execution, was made under the Code of 1808, and is inconsistent with the provisions of art. 2417 of the present Civil Code. *Brassac* v. *Ducros*, 335.

6. Defendants, commission merchants, having contracted to sell a quantity of cotton belonging to their principals, to a third person for cash, before payment of the price or delivery, plaintiffs seized, in the hands of such third party, under a *fi. fa.* in a judgment against defendants, all the property, rights and credits of the latter. *Held*, that the vendors not being bound to deliver the cotton until the price was paid (C. C. 2463,) nothing was seized; and that the vendee might have disregarded it, and have paid the price to defendants and received the cotton. *Montgomery* v. *Brander*, 400.

7. Art. 2456 of the Civil Code, which declares that, "where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and, with respect to third persons, the parties must produce proof that they are acting in good faith, and establish the reality of the sale," recognizes the validity of the sales of movables against third persons, where the seller retains possession by a precarious title. To give effect to this article, and to the provisions of arts. 1917 and 2243 of the same Code, the cases put in art. 2456 must be considered as exceptions to the rule laid down in arts. 1917 and 2243.

Gontier v. *Thomas*, 435.

8. Immovables settled as dowry, cannot be alienated during the marriage, except in the cases provided for by arts. 2338, 2339, 2340, 2341, of the Civil Code. C. C. 2337. But when made in conformity to law, the sale is definitive and irrevocable, forever freeing them from any dotal rights of the wife. *Montfort* v. *Her Husband*, 453.

II. *Obligations and Privilege of Vendor.*

9. An exclusion of warranty, fraudulently made, cannot avail the vendor, who is bound to disclose redhibitory vices and defects, within his knowledge, not discoverable on inspection. C. C. 2480. *Aliter*, where such exclusion was made in good faith, there being no proof that the vendor knew of the existence of such vices. *Ogden* v. *Michel*, 155.

10. The exhibition of a sample on the sale of merchandize, is an indirect and tacit representation of the quality of the article; and unless the warranty is clearly and explicitly excepted by the vendor, he must deliver the article in a condition equal to that of the sample. *Phillipi* v. *Gove*, 315.

11. The vendor is bound to perfect the title of his vendee, before he can call upon the latter, for payment of the purchase money.

Toledano v. *Desban*, 330.

12. Where a vendor allows the things on which he has a privilege, to be sold confusedly with a mass of other things belonging to his vendee, without making his claim, the privilege will be lost. C. C. 3195.

Bonnabel v. *Rabeneau*, 419.

III. *Obligations of Vendee.*

13. The purchaser of dotal property legally alienated, has nothing to do with the investment of the proceeds; the husband alone has the administration of the dowry. C. C. 2330. All that the purchaser has to do is to pay the price to the husband, who may act alone for the preservation or recovery of the dowry. The proceeds stand in lieu of the property itself, and become dotal. C. C. 2327. If the husband fail to reinvest the dotal funds, the wife will have a legal mortgage on his immovables, and a privilege on his movables, for their restitution. C. C. 2355, 3287.

Montfort v. *Her Husband*, 453.

IV. *Rescission.*

14. The rule, *Quæ temporalia sunt ad agendum, sunt perpetua ad excipiendum*, applies only where a defendant is in the exercise of the right, or in possession of the property or position, attempted to be taken from him. It cannot protect a party who has remained silent, and suffered a purchaser to keep possession during the period required to prescribe an action of recission.

Lea v. *Myers*, 8.

15. The redhibitory action must be instituted within a year from the date of the sale; the only exceptions to this rule being, where the vendor knew of the vice and neglected to declare it to the purchaser; or, not being domiciliated in the State, absented himself before the expiration of the year following the sale, when the prescription remains suspended during his absence. C. C. 2512. *Ogden* v. *Michel*, 155.

16. A. had two children by his wife, who, after his death, married B., by whom she also had children, and B. became the tutor of the children of the first marriage. B. having died, C. was appointed tutor to the issue of both marriages, and after the majority of the children by the first husband, presented his accounts to the Court of Probates, both as their tutor, and as tutor of the minor heirs of their first tutor. On an opposition to the approval of the account made by the heirs of the first marriage, claiming the proceeds of a tract of land, included in an inventory made after the death of the wife, of the community which existed between her and her second husband, which had been adjudicated to the latter as property common between him and his children, and which, after his death, was sold as belonging to his succession, it was proved that the land belonged to the father of the opponents before his marriage. The land was claimed by the heirs of B., under an act of sale executed by A. to D., from whom they derived title. D. being sworn as a witness testified, that the land had been conveyed to him by A., but that he had never paid any part of the price, nor taken possession of the land, there being an understanding between A. and himself, that he should re-convey the land when required; that after A's death, in consideration of receiving back a note he had given for the price from B., he conveyed the land to B. and his wife, believing that thereby the legal title thereto would be vested in the heirs of A. The tutors excepted to the admissibility of this evidence, on the ground that A. having been a party to the sale to D. the opponents, his heirs, cannot, any more than he could, prove its simulation, without producing a counter-letter. *Per Curiam.* If such a letter had been taken by A., as the evidence renders probable, it must have fallen into the hands of B. their tutor, and the very person who they allege attempted to defraud them. Under such circumstances they should, perhaps, be permitted to prove the simulation by parol.

Tutorship of Hacket, 290.

17. As a general rule, written titles are conclusive between the parties, and they are estopped from contradicting them; but third persons, not parties to an act, may prove its simulation by parol, or that an act purporting to be

a sale, was in truth a *dation en payement* for the benefit of such third persons, and this especially where fraud is alleged. *Ib.*

18. Where several things sold together, *e. g.* so many coils of bale rope, are independent of each other, not forming a whole, and their value is not increased by their union, a redhibitory action will lie only for the things found defective, and the contract must be carried into effect as to the rest. Such is the clear inference from art. 2518 of the Civil Code.

Ledoux v. *Armor*, 381.

19. In the absence of any expression of legislative will, proof of its being the commercial custom of a particular place as to certain articles, to take back the whole lot sold, and to restore the price on the discovery of any portion being defective, would be entitled to some weight, if shown to have existed long enough to have become generally known, and to warrant the presumption that contracts were made in relation to it; but where the law has provided a rule, no customs of any set of men can have a force paramount to the law. *Ib.*

20. Pending an action for the rescission of a sale, vendees sold the article which was the subject of the contract, without the consent of defendant, or any order of court. *Held*, that the return of the thing sold is indispensable to a recovery in any redhibitory action, and that by such sale the plaintiffs disabled themselves from recovery. *Ib.*

21. Where the purchaser at a Sheriff's sale, shows a judgment, execution, and sale, the presumption *omnia recte acta*, will arise in his favor. It is for the opponent, who seeks to annul the sale, to destroy this presumption, by proof of such irregularities as must vitiate the proceedings.

New Orleans Gas Light and Banking Company v. *Allen*, 387.

22. Where, in an action to rescind a sale, on the ground that it was made with the view of giving a preference to certain creditors of the vendor, who is stated to be insolvent, the petition does not allege that the purchasers knew that their vendor was insolvent, and that the latter had not property sufficient to pay the debt of the petitioner; the sale cannot be avoided.

New Orleans Gas Light and Banking Company v. *Currell*, 438.

23. Art. 1982 of the Civil Code is applicable exclusively to a particular class of cases, in which the only alleged ground of nullity is an undue preference given to one of the creditors of an insolvent; while art. 1989 applies to all other contracts by which creditors are injured. *Ib.*

V. *Judicial and other Public Sales.*

24. The prescription of five years, established by sect. 4 of the act of 10th March, 1834, entitled "an act relative to advertisements," as to "all informalities connected with or growing out of any public sale by a parish judge, sheriff, auctioneer, or other public officer," applies only to such informalities as relate to the manner, time, and place of making the advertisements required by law for public sales, and not to all illegalities or nullities whatsoever. *Morton* v. *Reynolds*, 26.

25. Where a Sheriff executes a deed to the purchaser of property sold at a

judicial sale, stating therein that he had received the price, he will be responsible for any balance coming to the debtor, though he may not have received any part thereof; but if the debtor, with a full knowledge of the facts, enters into an agreement with the purchaser, by which the property is re-conveyed to him on conditions stipulated between themselves, it will be too late for him to complain. *Winter* v. *Zacharie*, 35.

26. The purchaser at a sheriff's sale cannot refuse to pay the price he has bid, on the ground that there existed mortgages on the property of an older date than that under which he purchased, or that the legal formalities have not been complied with, unless he has been disturbed in his possession, or has just reason to apprehend that he will be. C. P. 710.

Collins v. *Daly*, 112.

27. Where the purchaser of property of a succession, sold by order of a Court of Probates, fails to comply with the terms of the sale, that court has authority to compel a compliance, or to order the property to be sold anew *à la folle enchère*. *Landry* v. *Connely*, 127.

28. The execution of an act under private signature, by the purchaser of property at a succession sale, resold by order of the Probate Court on his failure to comply with the terms of sale, by which he consents to lease or buy the property from the second purchaser, is an acquiescence in the judgment divesting his title. *Ib.*

29. Where the property of minor heirs has been illegally sold, though not bound by the proceedings, they may on coming of age ratify the sale, and claim the proceeds. *Tutorship of Hacket*, 290.

SEQUESTRATION.

1. The remedy given to a defendant, by proceedings on the sequestration bond, is not exclusive of others. *Clark* v. *Christine*, 196.

2. A sequestration can be issued only in cases in which it is expressly allowed by law. *Talamon* v. *Ytasse*, 462.

3. Plaintiffs in an action to annul a sale of land made by their debtor to a third person as in fraud of their rights, having no lien or privilege upon the property, cannot cause it to be sequestered, pending the action, on the ground that they are apprehensive that the purchaser will sell or incumber it for the purpose of defrauding them and the other creditors of the vender; nor could they, were the land still in the possession of their debtor. C. P. 275. Acts of 7th April, 1826, § 9, and 20th March, 1839, § 6. *Ib.*

4. In ordinary cases of attachment, or where a judicial sequestrator is necessary, the law has provided an officer, to wit, the sheriff. to take care of the property seized; but he is to act only in the event of the parties failing to appoint a fit and proper sequestrator, or keeper of their own selection.

Frazier v. *Willcox*, 517.

5. Art. 2941, *et seq.* of the Civil Code, which authorize the appointment, and prescribe the duties of conventional sequestrators, do not prevent parties from conferring other powers on such officers. *Ib.*

SHERIFF.

1. Where a sheriff executes a deed to the purchaser of property sold at a judicial sale, stating therein that he had received the price, he will be responsible for any balance coming to the debtor, though he may not have received any part thereof; but if the debtor, with a full knowledge of the facts, enters into an agreement with the purchaser, by which the property is reconveyed to him on conditions stipulated between themselves, it will be too late for him to complain. *Winter* v. *Zacharie*, 35.

2. A sheriff must, at his peril, avoid seizing under execution, property not belonging to the defendant. It is not enough that he should presume, even on strong grounds, that it belongs to the latter; he must know it. *Duperron* v. *Van Wickle*, 39.

3. One whose property is illegally seized under an execution against another person, is not bound, on being informed thereof, to give any notice to the sheriff. He may, at once, seek relief by suit; unless, to avoid costs, he choose to make an amicable demand. And where the property has been sold by the sheriff, he will be entitled to recover, not the price at which it was sold, but its real value at the time. *Ib.*

4. In an action by a third person, against the sheriff and the plaintiffs in execution, for the value of property belonging to such third person, illegally seized and sold, and the proceeds of which had been applied in satisfaction of the execution, it will be no defence on the part of such plaintiffs that they did not authorize the seizure. They are bound to indemnify those who have been injured by the party employed to make the amount of their execution. *Qui sentit commodum, debet sentire et onus. Ib.*

5. Where one whose property has been seized under an execution against a third person notifies the marshal or sheriff that the property seized belongs to him, he will not, by omitting to take legal measures to prevent the sale, lose his recourse against the officer. *Wright* v. *Cain*, 136.

6. A purchase by a deputy sheriff of property sold by himself under a *fieri facias*, is absolutely null. *M'Cluskey* v. *Webb*, 201.

See SEQUESTRATION, 4.

SHIPPING.

The master of a vessel cannot hypothecate her for a preexisting debt, and the necessity for the loan must be shown to have existed at the time it was made. The bond is not evidence of this necessity, nor of the absence of other means of obtaining the money. This must be shown *aliunde*, and otherwise than by the statement of the master, who cannot acquire authority from his own assertions. *Clark* v. *Laidlaw*, 345.

SIMULATION.

See FRAUD.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of the United States.*
II. *Statutes of the State.*
III. *Statute of Pennsylvania.*

I. *Statutes of the United States.*

1789, September 24. Judiciary act. *West* v. *His Creditors*, 88.
1793, March 2. Amending judiciary act of 1789. *Ib.*
1830, May 5. Authorizing Registers of the Land Office in Louisiana to receive entries of lands in certain cases. *Kittridge* v. *Breaud*, 79.
1841, August 19. Establishing uniform system of bankruptcy. *West* v. *His Creditors*, 88.

II. *Statutes of the State.*

1810, March 24. Recording of mortgages and other notarial acts. *Succession of Falconer*, 5.
1813, March 26. ——— *Ib.*
1814, March 14. Incorporation of Catholic Church of St. Francis of Pointe Coupée. *Church of St. Francis of Pointe Coupée* v. *Martin*, 62.
1815, January 30. State Taxes. *Voisin* v. *Guillet*, 267.
——, March 25, § 12. Duty of clerks of court as to fines to be collected by Sheriff. *Inhabitants of New Orleans* v. *Hozey*, 378.
1817, February 20. Voluntary surrender of property. *Cougot* v. *Fournier*, 420.
1818, March 13. Election of domicil as to promissory notes in favor of banks *Union Bank of Louisiana* v. *Lattimore*, 342.
——, —— 18. Creating offices of Surveyor General and Parish Surveyors, *Buisson* v. *Grant*, 360.
1823, March 27. Incompetency of maker of bill or note, as a witness. *Johnson* v. *Marshall*, 157.
1824, April 12, § 16. Repealing articles of Civil Code inconsistent with Code of Practice. *Vance* v. *Lafferanderie*, 340.
1825, February 19. Amending art. 341 of Civil Code as to tutors. *Tutorship of Hacket*, 291.
1826, April 7, § 9. Amending Code of Practice—sequestrations. *Talamon* v. *Ytasse*, 462.
———, § 11. ——— Commissions to take testimony. *Slidell* v. *Rightor*, 59.
1827, January 31. Emancipation of slaves. *Nimmo* v. *Bonney*, 176.
——, March 13. Protests of bills and notes. *Johnson* v. *Marshall*, 157.
——, ——— 20, § 5. Conveyances of immoveables and slaves in Parish of Orleans. *Brassac* v. *Ducros*, 335.
1828, March 25, § 13. Actions against heirs after partition of successions. *Picou* v. *Dussuau*, 412.

1828, March 25, § 25. Abolishing rules of proceedings in force before promulgation of Code of Practice. *Union Bank of Louisiana* v. *Lattimore*, 342.

1829, February 7. Roads and levies—rights of undertaker of improvements to seize and sell land. *Newcomb* v. *Police Jury of East Baton Rouge*, 233.

1832, April 3. Opening and improvement of Streets, &c. in New Orleans. *Application of Mayor &c. of New Orleans for widening of Roffignac Street*, 357.

1833, February 26, § 1. Charter of First Congregational Church of New Orleans. *First Congregational Church of New Orleans* v. *Henderson*, 209.

1834, March 10, § 4. Relative to advertisements—prescription against informalities in sales by public officers. *Morton* v. *Reynolds*, 26. *McCluskey* v. *Webb*, 201.

1835, April 1, § 20, 27. Charter of Exchange and Banking Company of New Orleans. *Commissioners of the Exchange and Banking Company of New Orleans* v. *Bein*, 225.

1836, February 25. Charter of Merchants Bank of New Orleans. *Frazier* v. *Willcox*, 517.

1837, March 13. Voluntary surrender of property and settlement of successions. *Montilly* v. *His Creditors*, 142. *Nimmo* v. *Bonney*, 176.

——, March 13. Expediting construction of New Orleans and Nashville Rail Road. *State* v. *New Orleans and Nashville Rail Road Company*, 231.

——, March 13. Limited or anonymous partnerships. *Frazier* v. *Willcox*, 517.

1838, March 12. Amending act of 13th March, 1837, relative to the New Orleans and Nashville Rail Road Company. *State* v. *New Orleans and Nashville Rail Road Company*, 231.

——, March 12. Collector of State taxes on lands, &c. in Parish of Orleans. *Voisin* v. *Guillet*, 267.

1839. March 20, § 6. Amending Code of Practice—sequestrations. *Talamon* v. *Ytasse*, 462.

————, § 7. ———— demands in reconvention. *Mayo* v. *Savory*, 1. *Clark* v. *Christine*, 196.

————, § 17. ———— commissions to take testimony. *Clark* v. *Savory*, 1.

————, § 19. ———— error and irregularities in appeals. *Duperron* v. *Van Wickle*, 39.

1840, February 28. Collector of State taxes on lands, &c. in Parish of Orleans. *Voisin* v. *Guillet*, 267.

——, March 28, § 10. Abolishing imprisonment for debt—presumption of fraud. *Hanna* v. *Auter*, 221.

———— Supplementary to act of same date abolishing imprisonment for debt. *Phillips* v. *Hawkins*, 218.

1841, February 27. Recusation of judges in third, ninth, and tenth judicial districts. *Penny* v. *Weston*, 165.

——, March 6. Amending charter of First Congregational Church of New Orleans. *First Congregational Church of New Orleans* v. *Henderson*, 209.

1842, February 5. Reviving charters of banks in New Orleans. *Union Bank of Louisiana* v. *Erwin*, 458. *State* v. *Union Bank of New Orleans*, 499.

——, February 24. To prevent further violations of law by the banks. *State* v. *Union Bank of Louisiana*, 499.

——, March 14. Liquidation of banks. *White* v. *Commissioners of the Merchants Bank of New Orleans*, 363.

——, March 22. Exempting certain rights from seizure under a *fi. fa.* *Vance* v. *Lafferanderie*, 340.

III. *Statute of Pennsylvania.*

Charter of the Bank of the United States of Pennsylvania. *Frazier* v. *Willcox*, 517.

SUBROGATION.

See SURETY, 4, 5.

SUBSTITUTION.

See DONATIONS MORTIS CAUSA, 7, 8, 11, 12.

SUCCESSIONS.

I. *Jurisdiction in matters of Succession.*
II. *Of Executors, Administrators, and Curators.*
III. *Inventory of Effects.*
IV. *Heirs and Legatees.*
V. *Claims against Successions.*
VI. *Prescription as affecting Successions.*
VII. *Sale of Property.*

I. *Jurisdiction in Matters of Succession.*

1. The ordinary tribunals have jurisdiction of suits against heirs, whether minors or of age, in all cases where an estate, after having been administered by a curator, testamentary executor, or tutor of a beneficiary heir, has come into their possession, or has been absolutely accepted; while the courts of probate have exclusive cognizance of all claims for money against successions under the management of curators, testamentary executors, or administrators. C. P. 924, 995, 996. *Babin* v. *Dodd*, 20.

2. Claims against minors, interdicted or absent persons, whose estates are administered by curators, may be recovered before the ordinary tribunals. It is no objection to the exercise of such jurisdiction, that courts of probate have alone the means and right of fixing the amount which a tutor may allow for the expenditures of his ward. Proof of the means and revenue of the latter may be adduced before either tribunal; nor would any judgment of an ordinary court, allowing the claim, interfere with the powers of the court of probate, when auditing the tutor's accounts, to reject such portion of the sum paid under the judgment as might be found to exceed the revenue of the ward; as the tutor would be liable for any illegal acts or contracts made by him, on which such judgment was rendered. *Ib.*
3. The Court of Probates having jurisdiction of actions for the partition of successions, must necessarily inquire what property composes the estate to be partitioned, and have power to decide upon questions of title incidental to the main question of partition, though without jurisdiction, under other circumstances, to decide such a question. *Penny* v. *Weston*, 165.
4. Courts of ordinary jurisdiction have exclusive cognizance of actions to annul a partition of slaves, made among the heirs of a succession.
Clark v. *Christine*, 196.
5. Courts of Probate have concurrent jurisdiction, with the District Courts, of an action by the heir for the settlement and partition of the community which existed between a husband and wife, after its dissolution by the death of the latter; and the circumstance of the defendant's denying the heirship of the plaintiff, and alleging himself to be the heir, can in no manner change the nature or object of the action, so as to deprive the Court of Probates of its jurisdiction. Nor can its jurisdiction be affected by the fact that the plaintiff's right to inherit must be determined, before proceeding to examine the issues relative to the settlement and liquidation of the community; the competency of the court being determined by the nature of the legal rights which the plaintiff seeks to enforce, and not by the question of his right to recover. *Babin* v. *Nolan*, 278.
6. Art. 996 of the Code of Practice which provides, that when an estate "is in the possession of heirs, either present, or represented in the State, though all or some of them be minors, actions for debts due from such successions shall be brought before the ordinary tribunals, either against the heirs themselves, if they be of age, or against their curators if they be under age or interdicted," applies to estates accepted absolutely, or to those which, after having been administered by a curator, testamentary executor, &c., have come into the possession of the heirs. If the heirs be all of age, and accept unconditionally, they are immediately put in possession of all the property, and are suable before the ordinary tribunals for their virile portion of the debts, as if contracted by themselves. If some are minors, the succession cannot be accepted by, nor for them, but with the benefit of inventory. When thus accepted, it cannot be administered partially, but the whole estate must be placed under the management of an administrator, and no part comes legally into the possession of the heirs as such, until the ad-

ministration is terminated, or a partition is legally made among the heirs. Until such administration or partition, the estate must be administered under the authority of the Court of Probates, in which it was opened, and all claims for money against it must, under arts. 924, § 13, and 983 of the Code of Practice, be presented there for settlement. C. C. 1002 1040, 1051. C. P. 992. Act 25th March, 1828, ch. 83, § 13.

Picou v. *Dussuau*, 412.

See COURTS, 10.

II. *Of Executors, Administrators, and Curators.*

7. The executors appointed by the testator, or, in case of their failure to act, a dative testamentary executor, are the only persons competent to carry the provisions of a will into effect.

State v. *Judge of Probates of New Orleans*, 42.

8. Action by the heirs against the executors to recover the possession of certain slaves until they can be legally emancipated, in compliance with the will of the testator and the value of their services from the death of the ancestor: *Held*, that, the petitioners having proved their heirship only on the trial of the cause, the executors, who are rightfully in possession of the slaves and bound to keep them, are not accountable for the value of their services. *Nimmo* v. *Bonney*, 176.

9. A testamentary executor, to whom the deceased bequeathed a certain sum as a recompense for services rendered by him, and as an evidence of the friendship of the testator, and who has accepted the bequest, cannot claim any commission for his services, unless the testator formally expressed his intention that such legacy should be over and above the commissions. C. C. 1679. Nor where, after the expiration of his term as executor, he has continued to act as administrator in the settlement of the estate, can he charge any commission in the latter capacity. His legacy stands in lieu of all commissions, in the administration of the estate.

Succession of Cucullu, 397.

10. Where one who has acted as curator of a succession, and failed to pay over funds which came into his hands as such, makes a voluntary surrender of his property to his creditors, under the act of 20th February, 1817, the surety on his bond as curator may oppose his surrender. C. C. 3026. The failure or neglect of a creditor to oppose the surrender, cannot operate a release of the surety. *Per Curiam:* The effect of the surrender was only to discharge the debtor from imprisonment; it did not release him from the payment of his debts. *Cougot* v. *Fournier*, 420.

III. *Inventory of Effects.*

11. The principal object of the law requiring a public inventory to be made of all the effects, moveable and immoveable, of a succession or community, is to establish the existence of all the property, and to show the whole amount, or value thereof. C. C. 1098, 1099, 1100, 1101. Such an inventory is to serve us as the basis of the settlement of the estate, so far as it shows the

effects belonging to it, but is not conclusive proof of the real value of the property, nor the exclusive criterion by which those who are interested, are to be charged in the partition and settlement of the estate. Save where the law has declared in positive terms that the property inventoried shall be taken at the estimated value, such estimation is not conclusive.

Babin v. *Nolan*, 278.

IV. *Heirs and Legatees.*

12. One who claims to be put in possession of an estate as universal legatee, must proceed contradictorily with the testamentary executors, or dative testamentary executor; if there be neither, he must cause a dative testamentary executor to be appointed. C. C. 1000, 1001, 1002, 1003. And so of successions administered by curators. C. C. 1181.

State v. *Judge of Probates of New Orleans*, 42.

13. Minor heirs, who have not acccepted, must be considered (saving their right to accept at a future time,) as strangers to the succession.

Leonard v. *Fluker*, 148.

14. Where by the death of a minor child, its mother becomes seized of all the rights of the former to the succession of the father, no preliminary steps are required to be taken by the mother, in the nature of an *additio hæreditatis* to complete her right, in order to commence an action against the other heirs for a partition of the succession. *Penny* v. *Weston*, 165.

15. An action of debt against an heir may be premature, before he has signified his intention to accept the succession, and in an action of partition, under such circumstances, the defendant might disclaim; but the plaintiff is not bound, in the first instance, to institute any proceeding to compel him to assume the quality of heir. *Ib.*

16. Where in an action for the partition of a succession, in which a settlement of all claims among the heirs ought properly to be gone into, an act signed by the tutrix of the minor heirs, waiving her mortgage as tutrix on a tract of land, had been given in evidence, a promissory note executed as evidence of the debt secured by the mortgage, may be received to rebut the presumption of payment resulting from the release of the mortgage. *Ib.*

17. One who has accepted a remunerative legacy, will be bound by the acceptance. If he considered himself entitled to claim a larger sum for his services, he should have renounced the legacy, and have claimed as a creditor.

Succession of Cucullu, 397.

See Donations Mortis Causa, 5.

V. *Claims against Successions.*

18. The privilege of the lessor on the moveables found in the house, yields to that for the funeral expenses of the debtor and family, where there is no other source from which they can be paid; but it must be placed on the tableau of distribution immediately after such expenses.

Succession of Devine, 366.

19. A claim for a sum of money against a succession, should not be engrafted

on a proceeding, the object of which is to call upon the heirs to declare whether they accept or refuse the estate. Where, under such a proceeding, the heirs of full age fail to answer whether they accept or renounce, they may be declared unconditional heirs, and liable to be sued as such. C. C. 1029. But as to minors, no judgment of any kind can be rendered against them. They can, under no circumstances, be considered as having accepted absolutely; (C. C. 346;) but must be regarded as heirs of age, accepting with the benefit of inventory. The succession should have been put under administration, as provided by art. 1040 of the Civil Code.

Picou v. *Dussuau*, 412.

See DONATIONS MORTIS CAUSA, 10.

VI. *Prescription as affecting Successions.*

20. Under the provision of the Code of 1808, book 3, title 1, art. 74, which declares that "until the acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect the deceased, who was the owner of the estate," prescription ran against a vacant succession, although minors were interested. *Leonard* v. *Fluker*, 148.

VII. *Sale of Property.*

21. Article 1265 of the Civil Code, which provides that "any co-heir of age, at the sale of the hereditary effects, can become a purchaser to the amount of the portion owing to him from the succession, and is not obliged to pay the surplus of the purchase money over the portion coming to him, until this portion has been definitively fixed by a partition," does not apply to the case of a husband who resists the payment of a note executed by him, in the hands of the administrator of the succession of the payee, on the ground that his wife is an heir of the deceased. *Landry* v. *Le Blanc*, 37.

22. Where the purchaser of property of a succession, sold by order of a Court of Probates, fails to comply with the terms of the sale, that court has authority to compel a compliance, or to order the property to be sold anew *à la folle enchère*. *Landry* v. *Connely*, 127.

23. The execution of an act under private signature, by the purchaser of property at a succession sale, resold by order of the Probate Court on his failure to comply with the terms of sale, by which he consents to lease or buy the property from the second purchaser, is an acquiescence in the judgment divesting his title. *Ib.*

SUMMARY PROCEEDINGS.

Injunctions, arresting summary proceedings, apparently authorized by the parties, are required by the Code of Practice, (arts. 740, 741, 751, 756,) to be tried summarily; but the parties cannot be deprived of any of the means of procuring evidence, within a reasonable delay. *Slidell* v. *Rightor*, 59.

SURETY.

1. In a question as to the sufficiency of the surety on an attachment bond, his actual means, and not the amount for which, from the nature of the case, he may be ultimately liable, must be looked to. C. C. 3011, 3012, 3033. *Lard* v. *Strother*, 95.

2. In an action by the payee, against the endorsers of a note who put their names on it merely to secure its payment, the latter must be viewed as sureties, and as such will be entitled to avail themselves of all the pleas not personal to the principal, of which he could take advantage. C. C. 2208. *Johnson* v. *Marshall*, 157.

3. Where one not a party to a bill or note, puts his name upon it, he will be presumed to have done so as surety. *Gilbert* v. *Cooper*, 161.

4. Plaintiff having paid A. the amount of a judgment, for which he had become liable, as surety of B. on an appeal bond, obtained in February, 1842, a judgment subrogating him to all the rights of A., who, in December, 1840, had recovered judgment against defendant, as surety of B., on a bail bond executed at the beginning of the original suit, sued to revoke a sale made by defendant in December, 1840, as fraudulent; *Held*, that the prescription of one year, established by art. 1989 of the Civil Code, must bar any action against defendant, by A.; that plaintiff, being subrogated to A.'s rights, can have no greater rights than he had; that the judgment of subrogation of February, 1842, is not one rendered against the defendant within the meaning of art. 1989; and that the prescription did not commence to run from its date, but from that of the judgment of A. against the defendant, obtained in December, 1840. *Walker* v. *Vaudry*, 395.

5. Where the holders of a note, the payment of which the makers guarantied by the pledge of another note secured by mortgage, do any act by which the mortgage is destroyed, the endorsers of the first note will be released, they having a right to be subrogated to the mortgage. C. C. 3030. *Commissioners of the Merchants Bank of New Orleans* v. *Cordeviolle*, 506.

See BAIL. CONTRACTS, 3. SUCCESSIONS, 10.

SURVEY.

The act of 18th March, 1818, creating the offices of Surveyor General and Parish Surveyor, contains nothing indicating an intention to prevent any municipal corporation within a parish, from appointing their own surveyors, or making it the duty of owners of property to employ the surveyors appointed by the State, and no other; and arts. 828, 829 of the Civil Code mainly relate to cases of dispute between adjoining proprietors as to the boundaries between their lands. Although the formalities prescribed by these articles are required to be fulfilled by a sworn officer of the State, for the purpose of fixing permanently the limits of property, it does not follow

that a surveyor appointed by a municipal corporation, or any other not commissioned by the State, cannot be employed by a proprietor desirous of having his land surveyed and its limits ascertained; but such survey and fixing of limits, will not have the same binding effect upon his neighbor, as if made by the Parish Surveyor, nor will the *procès verbal* prove itself, or obtain full faith in the courts of this State. *Buisson* v. *Grant*, 360.

TAXES, COLLECTOR OF STATE.

The act of 12th March, 1838, creating the office of Collector of State taxes on landed property, slaves, and vehicles for the parish of Orleans, contemplates and provides that a collector of State taxes for that parish shall be appointed every year, for the special purpose of collecting the taxes due on the assessment roll, made for and during the year of his appointment, without any reference to the collection of the balance of the taxes remaining due for the preceding year. The bond required relates exclusively to the assessment made during the year of the appointment. And under the act of 28th February, 1840, amending that of 12th March, 1838, though another person may have been appointed collector for the next year, the collector of the preceding year is authorized, and bound to retain the assessment roll and receipts for taxes uncollected at the end of his year, and to proceed with the collection of such taxes until, according to the terms of his contract with the State, he shall have collected and accounted for all the State taxes for the year for which he was appointed. The appointment of a new collector does not destroy the commission of his predecessor.

Voisin v. *Guillet*, 267.

THIRD PERSONS.

A wife who has renounced the community of *acquêts*, must be regarded as a third person in relation to sales of community property made during the marriage; and every thing done during the marriage in relation to the sale or alienation of property, must be viewed as done by the husband alone.

Brassac v. *Ducros*, 335.

TREATY OF PARIS.

The third article of the treaty of Paris, of the 30th April, 1803, between the United States and the French Republic, by which the territory of Louisiana was ceded to the former, ceased to have any effect after the admission of Louisiana into the Union, on the 30th April, 1812.

Church of St. Francis of Pointe Coupée v. *Martin*, 62.

TRIAL.

Where an inferior judge refuses to try a cause at issue between the parties,

on the ground that others unknown, may be interested, and should be made parties, a mandamus will be granted to compel him to proceed. If those who are interested and informed of the proceedings, do not appear to protect their rights, they must bear the consequences; and those who are neither parties nor privies to the proceedings cannot be affected by the judgment.

State v. *Judge of the Commercial Court*, 227.

USURY.

1. A promise to pay usurious interest is not such a natural obligation as will form a good consideration for a legal contract. A natural obligation is one which cannot be enforced by action, but which is binding in conscience and according to natural justice. C. C. 1750, § 2. To perform a promise is a matter of conscience; and if a contract, not illicit or immoral, but to enforce which the law gives no remedy is actually performed, as where usurious interest has been paid, the money cannot be recovered. But the continuance of a promise, contrary in itself to law, cannot be enforced, however often the parties may change the evidence of it.

Rosenda v. *Zabriskie*, 493.

2. Where a contract stipulates for usurious interest, the creditor can only recover the principal debt. *Ib.*

3. Nothing in the charter of the Bank of the United States created by the State of Pennsylvania, prohibited it from making loans in Louisiana, at the highest rate of interest allowed by the laws of the latter State; and such loans are not usurious. *Frazier* v. *Willcox*, 517.

VERDICT.

Where in an action to recover possession of plans, books, &c., there is a verdict for the restoration of certain plans and books, and in default thereof, condemning the defendant to pay a fixed sum, a new trial must be allowed, that the verdict may determine what sum shall be paid on failure to deliver each particular plan or book.

Commercial Bank of New Orleans v. *Stein*, 189.

WARRANTY.

See Sale, 9, 10.

WILL.

See Donations Mortis Causa.

END OF VOLUME IV.